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upreme Court of the United States

OCTOBER TERM, 1938.

No. 448

VID T. WILENTZ, J. H. THAYER MARTIN AND WALTER R. DARBY, Etc., *et al.*,

Appellants,

vs.

SOVEREIGN CAMP, WOODMEN OF THE WORLD.

EAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

BRIEF FOR APPELLANTS.

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WILLIAM A. STEVENS,
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Counsel for EARL KIRCHER, CONRAD WEBER, and WILLIAM G. HIRSCH, members of the Board of Assessors of the Borough of Runnemede, New Jersey, and ALBERT W. SPENCER, Tax Collector of the Borough of Runnemede, New Jersey, Appellants.

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LD FRYE,
Of Counsel.

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Appellants,

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

BRIEF FOR APPELLANTS.

(b)

Official Report of Opinion Below.

The official report of the opinion delivered in the Court below by Judge John Boyd Avis will be found at 23 Federal Supplement 23 (U. S. D. C., D. N. J. 1938).

(c)

Statement of Grounds of Jurisdiction.

In compliance with paragraph 1 of Rule 12 of this Court, appellant duly filed a concise statement of the grounds on which the jurisdiction of this Court is invoked.

(d)

STATEMENT OF THE CASE.

Preliminary.

This is a suit in equity brought by a United States District Court judgment creditor, whose execution had been returned unsatisfied, to obtain injunctions and declaratory judgments against state officials and local government officials in the State of New Jersey. The state officials named are the Attorney General, the State Tax Commissioner and the Commissioner of Municipal Accounts, constituting the State Municipal Finance Commission, and the local officials are the Board of Assessors and the Tax Collector of the Borough of Runnemede, New Jersey. The basis of the suit is, in general, a claim of unconstitutionality of the New Jersey Act Concerning Municipal Finances in so far as it contains (a) provisions authorizing the court to require that suits against municipalities under the supervision of the Municipal Finance Commission be brought for the benefit of all creditors similarly situated and staying suits by individual creditors, and (b) provisions permitting the acceptance of bonds in payment of taxes in such municipalities.

An application was made for an interlocutory injunction before a three-judge court assembled pursuant to Section 266 of the Judicial Code on the theory that the character of relief demanded ousted the one-judge district court of jurisdiction. On the return day of the application for the interlocutory injunction, the hearing was adjourned until final hearing upon consent and order of continuance, and upon the defendants' agreement not to accept until the further order of the court any more bonds in payment of taxes. On October 29, 1936, the cause was heard on application for interlocutory injunction and on final hearing, and in the spring of 1938, the three-judge court filed an opinion holding that declaratory judgments should be rendered and permanent injunctions should be issued as therein indicated.

A decree in accordance with the opinion was entered June 6, 1938. Both the Municipal Finance Commission and the local government officials have appealed to this Court.

What the court below did was this:

As to the "stay" provisions—

It declared (R. 97) that the enforcement of the plaintiff's judgment should be in accordance with the laws existing in the State of New Jersey at the time of the issuance and sale of the bonds on which it was based (enumerating such laws).

It declared (R. 96, 99) that the stay provisions of the Act Concerning Municipal Finances were, as to the plaintiff's judgment, and as to the bonds held by the plaintiff and issued prior to the enactment of the stay provisions if and when judgment might be entered thereon in that court and execution issued, unconstitutional in so far as they affected the plaintiff's right to enforce its judgment or such a future judgment, as impairing the obligation of its contract.

It issued an injunction (R. 96, 99) against the Municipal Finance Commission's functioning in the borough to the extent that such functioning might be inconsistent with the right of the plaintiff to enforce in the manner stated its existing execution, or executions to be issued in the United States District Court upon judgments entered upon its bonds, but without prejudice to any of the powers and duties of the Municipal Finance Commission under the Act Concerning Municipal Finances except as the stays therein contained affected the right of the plaintiff to enforce its judgment or a judgment so entered.

As to the provisions permitting the acceptance of bonds in payment of taxes—

It declared (R. 98) that the acceptance of bonds in settlement of taxes might materially interfere with the plaintiff in the enforcement of its judgment.

It issued an injunction (R. 98) against all defendants from making settlement for taxes due and owing to the

borough by any medium except in accordance with the law of the State of New Jersey.

What the court refused to do was this:

It denied (R. 89, 96) as beyond the power of the court and unnecessary, a prayer in aid of pending mandamus proceedings that the local officials be enjoined from assessing, levying and collecting taxes without making provision for the plaintiff's judgment.

It denied (R. 94, 97) a prayer that the court remove a cloud upon the enforcibility of plaintiff's bonds and prevent a multiplicity of suits by enjoining the Municipal Finance Commission from functioning in the municipality, basing its denial in part upon a finding of fact that the plaintiff had not produced sufficient evidence to satisfy the court that it should use the extraordinary remedy of injunction to restrain the members of the Municipal Finance Commission from functioning in the municipality.

It failed to grant (R. 99) a prayer that the court enjoin and restrain the Municipal Finance Commission in the enforcement and execution of the stay provisions in the Municipal Finance Commission Act.

No appeal has been taken by the plaintiff.

The case as it comes to this court is, therefore:

That the three-judge court has held the stay provisions unconstitutional insofar as they affect the right of the plaintiff to enforce a judgment against this municipality *in this Court* and has accordingly enjoined the Municipal Finance Commission from functioning in this municipality to the extent that such functioning may be inconsistent with the right of the plaintiff to enforce such a judgment without prejudice to any of the Commission's powers and duties except as the stays in the Act Concerning Municipal Finances affect the right of the plaintiff to enforce such a judgment.

That the three-judge court has held that the acceptance of bonds in settlement of taxes may materially interfere

with the plaintiff in the enforcement of its judgment (and, presumably, that it is therefore unconstitutional) and has accordingly enjoined all defendants from accepting any settlement of taxes in any medium except in accordance with the laws of the State of New Jersey.

We shall deal with the correctness of the court's determination of the unconstitutionality of the stay provisions of the Act Concerning Municipal Finances in Point I, and with the correctness of its determination of the unconstitutionality of the provisions permitting acceptance of bonds in payment of taxes in Point II. In Point III, we shall make the point that the three-judge court was so clearly without jurisdiction that it was improvidently assembled and its decree should be annulled.

Facts.

Prior to May 15, 1934, the Borough of Runnemede, New Jersey, had defaulted for over sixty days in the payment of principal and interest of certain of its outstanding bonds or notes. The Borough Council, pursuant to Chapter 340 of the Laws of 1931, as amended and supplemented, (hereinafter referred to as the Act Concerning Municipal Finances, and printed in full as Appendix C, *infra*, pp. 89-148) petitioned Justice Lloyd of the Supreme Court of New Jersey, that the Municipal Finance Commission function in said municipality. The Justice, after summary investigation, made an order that the borough was unable to meet its obligations, and that order, together with the petition, was filed in the office of the Clerk of the Supreme Court of New Jersey. Thereupon, pursuant to the terms of the Act, the Municipal Finance Commission commenced to function in the borough and also in the school district of the borough, which is coterminous with the borough itself (Stipulation of Facts, R. 112-113).

On June 1, 1930, the plaintiff had purchased an issue of $78,000. of school bonds of the Board of Education of the

Borough of Runnemede, dated on that day, bearing interest at 5¼% per annum, payable semi-annually and maturing in numerical order, $2,000. on June 1 in each of the years 1932 to 1937, inclusive, and $3,000. on June 1 in each of the years 1938 to 1959, inclusive. On June 1, 1932, bonds Nos. 1 and 2 were paid. The Board of Education, however, defaulted in the payment of interest on the other bonds on June 1, 1932, and in the payment of principal on June 1, 1933. On or about July 12, 1935, the plaintiff sued on the defaulted bonds and coupons which had matured prior to that date, and a judgment for $21,776.21 was made and entered in favor of the plaintiff on December 5, 1935, in the United States District Court for the District of New Jersey (R. 113-114). Execution on that judgment was served upon the tax collector and tax assessor of the Borough of Runnemede and upon the County Board of Taxation of the County of Camden, in which the borough is situated, and execution was returned unsatisfied (Stipulation, R. 114, Return R. 124).

The plaintiff herein thereupon on February 14, 1936, filed a petition in the United States District Court for the District of New Jersey for a writ of mandamus to compel the assessment, levy and collection of taxes for the payment of the judgment (Stipulation, R. 115-116).

Counsel for the plaintiff on January 3, 1936, had written to the County Board of Taxation that the judgment had been obtained and execution served upon the Board, and asked whether the County Board would pursuant to Section 505 of Chapter 236 of the Laws of 1918, add the amount due to the amount to be raised by taxation in the Borough of Runnemede (Ex. 5 to Stipulation, R. 125-126). This letter was forwarded by counsel for the County of Camden to the secretary of the Municipal Finance Commission under date of February 8, 1936 (Ex. 12 to Stipulation, R. 127), and it was referred by the Commission to special counsel to the Commission, who replied to the counsel for the County Board of Taxation under date of February 18, 1936 (Ex. 13 to Stipulation, printed as Ex. C to Affidavit, R. 47-48). The

reply of special counsel to the Commission contained the following paragraph:

> "Of course, under the provisions of the Municipal Finance Commission Act, we will defend and oppose the granting of a writ on the ground that in the admitted insolvency of the municipality and School Board no writ of mandamus should issue to prefer any one creditor as against all creditors, in accordance with the Municipal Finance Commission law. This problem has had to be met in similar proceedings taken by clients advised by Mr. Vanderbilt."

Counsel for the County Board of Taxation thereupon replied to counsel for the plaintiff under date of February 24, 1936, that it was his understanding that there was pending a mandamus proceeding in the United States District Court, and that he was requested to advise counsel that the County Tax Board would not add the amount of the execution to the budget until a mandamus had been issued (Ex. 7 to Stipulation, R. 127).

The mandamus proceeding is still pending undetermined (Stipulation, R. 116).

The Borough of Runnemede is located in Camden County about six miles from the City of Camden. It has an area of about five square miles, and a population of some 2,450 (U. S. Gov. Census, 1930). The borough was improvidently formed, together with Bellmawr, Lawnside, Brooklawn and Mt. Ephraim from the old Centre Township in 1926 (R. 174), in the belief that the rising tide of prosperity would cause the suburban expansion of Camden in that direction, along the Black Horse Pike (R. 174). Extensive subdivision activities and speculative sales of realty followed (R. 167), and the borough, under the guidance of brokers interested in such expansion, went ahead rapidly with a relatively enormous layout of improvements, hoping to pay for them with assessment liens and increased valuations (R. 167). The depression brought these hopes to an abrupt end. The major part of the population of Runnemede are employed by the shipyards and other industries

of Camden and have only small salaries when they are working (R. 177). As a result of the collapse in the realty line, there are only about 726 buildings (R. 167), nearly all of a semi-bungalow type, and assessed at $1,500. to $3,000. (R. 173), on 6,327 lots and acre plots (R. 167). Isolated groups of houses are connected by grass grown streets (R. 167). A modern theatre in the borough was taken over by the town in fee simple due to total inability of its owners to meet taxes, and only recently could be disposed of for $10,000. (R. 203, 173). Land values have dropped to almost nothing (R. 174), and in early 1934 taxes and assessments against the 5,976 parcels of vacant land were uncollectible. An overlarge increase in the average tax bill, to be met by the few property owners living on their land or having improved their holdings, was impossible by reason of their lowered or lost wages.

In September, 1932, the borough could not meet interest and principal maturities on its funded debt and defaulted (R. 324). It successfully petitioned the New Jersey Supreme Court to the end that the Municipal Finance Commission might take over its affairs,—May 18, 1934 (*Ibid.*). On July 12, 1935, the Commission asserted its intention to function in the co-terminous school district of Runnemede in accordance with the provisions of the statute (R. 254).

The complaint stated that the Municipal Finance Commission had been "lax and dilatory" in its handling of the Borough and School District of Runnemede, that it was understaffed, dependent upon its employees for counsel and guidance, and had failed to produce beneficial results by its operation (Par. 19, R. 11-12).

Much evidence was introduced on this subject below. However, no finding with respect to it was made by the court and we fail to see how this question raised below has any bearing upon the issues brought before this Court by our appeal. We hesitate to add to the length which the indefiniteness of the decision below and the breadth of the subject make necessary in this brief. We have, however, marshalled

the facts which disprove this claim and added them as Appendix A to this brief, (*infra*, pp. 67-84), for use only in the event of a determination by this Court that the subject has a substantial bearing upon the questions before it.

(e)

Specification of Such of the Assigned Errors as are Intended to be Urged.

2. The said Court erred in assuming jurisdiction of the suit, under Section 266 of the Judicial Code (R. 101).

9. The said Court erred in denying these defendants' motion to remit the suit for trial to a single judge of the United States District Court for the District of New Jersey (R. 102).

25. The said Court erred in permanently enjoining and restraining defendant Municipal Finance Commission from functioning in the Borough of Runnemede, New Jersey, to the extent that such functioning may be inconsistent with the right of complainant to enforce its execution in the manner stated in the Final Decree (R. 103).

28. The said Court erred in failing to rule that the stays contained in the Municipal Finance Commission Act were constitutional (R. 103).

30. The said Court erred in ruling, in answer to subdivision D of the prayers of Count I of the Bill of Complaint, that Chapter 330, Laws of New Jersey, 1933, and Chapters 195 and 258, Laws of New Jersey, 1935, as amended and supplemented, are unconstitutional and void in so far as they affect the right of the complainant to enforce its judgment obtained and entered in the United States District Court for the District of New Jersey (R. 103-104).

31. The said Court erred in ruling, in answer to subdivision F of the prayers of Count I of the Bill of Complaint, that the enforcement of the complainant's judgment should be in accordance with the laws existing in the State of New

Jersey at the time of the issuance and sale of the bonds in question. (R. 104).

32. The said Court erred in ruling, in answer to subdivision F of the prayers of Count I of the bill of complaint, that the enforcement of complainant's judgment should be in accordance with and under the provisions of Section 35 of the Execution Act (2 Comp. Stats., p. 2256) and Section 237 of the School Law (4 Comp. Stats., p. 4804) (R. 104).

33. The said Court erred in ruling that Section 35 of the Execution Act (2 Comp. Stats., p. 2256) and Section 237 of the School Law (4 Comp. Stats., p. 4804) were not repealed by the provisions of the Tax Act of 1918 (R. 104).

38. The said Court erred in ruling in effect that acceptance of bonds in settlement of taxes may materially interfere with the complainant in the enforcement of its judgment (R. 104).

39. The said Court erred in enjoining and restraining defendants from making settlement for taxes due and owing to the Borough of Runnemede, New Jersey, by any medium "except in accordance with the laws of the State of New Jersey" (R. 104-105).

40. The said Court erred in enjoining and restraining defendants from accepting bonds in settlement of taxes (R. 105).

43. The said Court erred in ruling that Sections 8 and 9 of Chapter 330, Laws of New Jersey, 1933, and Chapters 191, 195 and 258, Laws of New Jersey, 1935, all as amended and supplemented, are, as to school district bonds held by complainant issued prior to their enactment, as and when judgment may be entered thereon or on any portion thereof in the United States District Court for the District of New Jersey, and execution issued, unconstitutional and void in so far as they affect the right of the complainant to enforce such a judgment (R. 105).

48. The said Court erred in permanently enjoining and restraining defendant Municipal Finance Commission from functioning in the Borough of Runnemede, New Jersey, to the extent that such functioning "may be inconsistent with the right of the complainant to enforce in the manner herein stated executions to be issued in this Court upon judgments entered upon such school district bonds" (R. 106).

(f)

ARGUMENT.

SUMMARY.

Summary of Point A that the court erred in holding unconstitutional the stay provisions of the Act concerning Municipal Finances.

Sections 351 to 355, inclusive, of the New Jersey Act Concerning Municipal Finances, in municipalities where the Municipal Finance Commission is functioning, stay proceedings for the enforcement of judgments against insolvent municipalities, and mandamus proceedings for that purpose, except that the New Jersey Supreme Court may relax these stays in any case; and, in particular, may authorize a mandamus proceeding brought by a creditor for the benefit of himself and all other creditors similarly situated. The Municipal Finance Commission is authorized to bring such an omnibus mandamus proceeding with the consent of the court.

The court below has held these stay provisions unconstitutional insofar as they affect the right of the plaintiff here to enforce a judgment which it has obtained in the federal court. The court does not anywhere in its decision determine in what way the stay provisions affect the right of the plaintiff to enforce its judgment. The court below has also enjoined the Municipal Finance Commission from functioning in the Borough of Runnemede to the extent that such func-

tioning may be inconsistent with the right of the plaintiff to enforce its execution. The court does not anywhere in its decision determine in what way the functioning of the Commission may be inconsistent with that right.

The New Jersey statute does not purport to have, and could not constitutionally have, any direct effect upon the powers of the courts of the United States. Nothing that the Municipal Finance Commission can do in connection with its functioning can either relax or impose the statutory stays. The decision below is therefore without practical effect. However, the moral effect of a decision by the United States courts that a state statute is unconstitutional is serious. For that reason, the State of New Jersey must attack the decision below.

Since the New Jersey statute can have no direct effect upon the power of the federal court, we must assume that the court below held it unconstitutional because of its indirect effect. Such an indirect effect could come only by reason of the acceptance of the principles of the New Jersey statute by the United States courts in their discretion as a matter of comity. The only interpretation which we can place upon the decision below is that the statute as applicable in the New Jersey courts is unconstitutional and that therefore it would be unconstitutional for the United States courts to adopt its principles as a matter of comity.

Even before the New Jersey courts were given by statute power to relax these stay provisions, they were held constitutional by the Court of Errors and Appeals in *Hourigan* v. *North Bergen Township*, 113 N. J. Law 143, 172 Atl. 193, concurring opinion 172 Atl. 785 (1934).

The federal courts without the benefit of any such statute reach a result substantially the same as the statutory stays by exercise of their discretion to withhold the writ of mandamus in behalf of individual creditors in cases where the municipality is endeavoring in good faith to provide to the limit of its power for equal treatment of all creditors. This was done by the Circuit Court of Appeals for the Third Circuit in *City of Asbury Park* v. *Christmas*, 78 F. 2d 103,

cert. denied 296 U. S. 624 (1935). The subsequent history of that legislation was that the Municipal Finance Commission required the City of Asbury Park to adopt a plan for the readjustment of its debt, and the United States District Court when the *Christmas* case was returned to it limited the creditor to the amount to which he would have been entitled under the refunding plan. The New Jersey Supreme Court at the suit of another creditor under these "stay" provisions (*Rippel* v. *Asbury Park*, 118 N. J. Law 45, 190 Atl. 489 (1937)), issued a corresponding writ for the benefit of all creditors except the one in the *Christmas* case.

Since the unquestionably constitutional powers of the federal courts under their discretion to withhold mandamus and the powers of the New Jersey courts under the stay provisions of the Act Concerning Municipal Finances are so similar, there must be something peculiar about the New Jersey law which makes the stay provisions unconstitutional, if they are unconstitutional. We must therefore examine the New Jersey law.

The New Jersey Act Concerning Municipal Finances is an attempt of that state to apply to the insolvency of municipalities the three elements of the equity receivership of a public service corporation, first, putting someone in control of the management of the property, second, concerted action in behalf of all creditors aided by a prohibition of destructive action by individual creditors asking preferences, and, third, a ratable realization by the creditors of that which the debtor can pay through settlement binding upon all.

The *first* element is supplied by creating the Municipal Finance Commission to supervise the current affairs of insolvent municipalities when the New Jersey Supreme Court has made a finding of insolvency.

It is these stay provisions of the Act which furnish the *second* element of the equity receivership, concerted action in respect of all creditors and a prohibition of destructive action by individual creditors seeking preferences.

The Act attempts to supply the *third* element of the equity receivership, the settlement binding upon all, by per-

mitting the New Jersey Supreme Court on petition of creditors of an insolvent municipality to make effective a plan for the readjustment of its indebtedness which has the approval of 85% of the creditors and the Commission, provided that it does not result in the reduction of the principal of the indebtedness of the municipality. These composition provisions have not yet been held constitutional and are not of as much importance as at the time of their passage in view of the subsequent adoption and upholding of the second Federal Municipal Bankruptcy Act.

The stay provisions remain of enormous importance, however, in view of the fact that the stays under the Federal Municipal Bankruptcy Act can be put in force only after 51% of the creditors have agreed upon a plan. It is extremely difficult to get together the 51% necessary if some of their fellows are engaged in a race of diligence for immediate payment of their claims. These statutory stays of the New Jersey state court are still valuable in furnishing exactly the protection pending the arrangement of a composition by constructively minded creditors, as was given by the exercise of discretion to withhold mandamus in the federal courts in *Asbury Park* v. *Christmas*.

The plaintiff below grounded its claim that the stay provisions were unconstitutional as applied in the New Jersey courts by saying that under the New Jersey state law existing at the time of the purchase of the plaintiff's bonds, mandamus was not a discretionary remedy and there was therefore a constitutional right of "every man for himself". Whatever support there may be for this claim in the language of the case cited by the plaintiff, *Rahway* v. *Munday*, 44 N. J. Law 395 (1882) rests upon its citation of the decision of this court in *City of Galena* v. *Amy*, 5 Wall. 705 (1866). It was not until after the New Jersey courts had adopted the language of the *Galena* case to the effect that the rights of creditors were absolute that this Court established the power of the federal courts by exercise of discretion in mandamus cases to spread the tax levy over a number of years instead of imposing it all at once as

required by the state statutes (*East St. Louis* v. *Amy*, 120 U. S. 600 (1887)).

Moreover, the statement in *Rahway* v. *Munday* was made before the decision of the Court of Errors and Appeals in *Vanderpoel* v. *Borough of Mt. Ephraim*, 111 N. J. Law 423, 168 Atl. 575 (1933), in which the highest court of New Jersey adopted the modern doctrine that municipal creditors rank *pari passu* in the case of insolvency.

Under this principle that no creditor has a right to a preference over his fellows, the stay provisions, when they substitute concerted action for individual action, are taking nothing away from existing creditors' remedies. It was on that ground that one of the two concurring opinions went in *Hourigan* v. *North Bergen Township* (113 N. J. Law 143, 172 Atl. 193, concurring opinion 172 Atl. 785, *supra*) the case which upheld the constitutionality of the stays in New Jersey. The other concurring opinion went on the ground that the statute was within the emergency powers of the Legislature, expressly stating that it was unnecessary to decide whether under other circumstances there would have been an impairment of the obligation of a contract.

Even were it not for the doctrine of the equality of creditors in cases of municipal insolvency, a statute which substitutes a remedy on behalf of all creditors for an individual creditor's absolute right is constitutional (*Pittsburg Steel Company* v. *Baltimore Equitable Society*, 226 U. S. 455 (1912)).

The other concurring opinion in the *Hourigan* case which upheld the constitutionality of the Act upon the ground of emergency was also correct in its law. The Act in Section 405 declares that it is intended by the Legislature to meet the public emergency arising from a default in the payment of municipal obligations and the resulting impairment of public credit. The testimony was that at the time of the passage of the Act more than one-third of the municipalities in New Jersey were in default, and at the time of the submission of the case between sixty and seventy were still in default, among which were the City of Atlantic

City, the City of Asbury Park, and the Township of North Bergen, a municipality with a population of 40,000.

The Act is not open to the objection that it is unconstitutional because it does not fix a time when the stays shall cease to be effective. The *Hourigan* case met this argument by citing decisions of this Court, including *Home Building and Loan Association* v. *Blaisdell*, 290 U. S. 398 (1934), to the effect that the operation of a statute imposing a stay to meet an emergency could in no event outlast the emergency.

This Court later in *W. B. Worthen Co.* v. *Thomas*, 292 U. S. 426 (1934), stated that the rule in the *Blaisdell* case applied only where the legislation was limited to the emergency and set up conditions apposite to emergency relief.

The Act Concerning Municipal Finances originally met the latter test by providing that the stays were applicable only in municipalities whose insolvency had required supervision of the Commission. It now meets the former test in view of its Section 405 which declares that the Act is intended by the Legislature to meet the emergency, coupled with Section 355, which has since been adopted, and which empowers the court upon application of any creditor to vacate, modify or restrict any statutory stay contained in the article. A like discretion conferred upon the courts by the second Frazier-Lemke Act had great weight in the determination that the second act was constitutional when the first had been held unconstitutional (*Wright* v. *Vinton Branch*, 300 U. S. 440, 460-464 (1937); *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555 (1935)).

If by any chance the decision below was based upon a construction of the New Jersey Act making the stays directly applicable to the federal courts, that construction was wrong in view of the obvious unconstitutionality of any such provision, coupled with the principle that a statute will not be construed in such a way as to make it unconstitutional if any other construction is open.

Summary of Point I-B that the enumeration of the statutes which govern the manner of the plaintiff's enforcement of its execution was incomplete.

The decree below contains what is in substance an enumeration of the various statutes as to the enforcement of the rights of municipal creditors which were in existence at the time of the purchase of the plaintiff's bonds. The decree declares that the plaintiff's judgment in the district court should be enforced in accordance with what was known as the Execution Act, and that the Execution Act was not repealed by the Tax Act of 1918. The Execution Act provides that a judgment creditor shall serve his execution upon the assessors of the municipality who shall add its amount to the tax levy while the Tax Act requires that the judgment creditor shall serve his execution on the County Tax Board, which shall add the amount to the municipal tax levy. The two statutes simply cannot co-exist and this has been conceded by counsel for the plaintiff in other litigation. The declaration in this respect must therefore be modified so as to make it clear that the Tax Act where inconsistent with the Execution Act covers the enforcement of the plaintiff's execution. It is submitted, however, that the Tax Act completely repeals the Execution Act and that it was the only statute fixing the plaintiff's statutory rights at the time of the purchase of the bonds.

Summary of Point II that the court erred in deciding against the right of the municipality to accept bonds in settlement of taxes.

At the time that the plaintiff purchased its bonds, municipalities were permitted to compromise the amounts of taxes due and owing in any case where the amount due was greater than the value of the property on which it was levied. (1928 N. J. Laws, ch. 123.) Thereafter Section 212 of the Act Concerning Municipal Finances was passed providing that the governing body of any municipality where the Commission was functioning could compromise *any*

taxes, except that no claims in excess of $500. should be compromised without the consent of the Commission. The municipality when under the supervision of the Commission in several cases accepted bonds in payment of taxes with the consent of the Commission which was required in view of the fact that more than $500. was involved. The plaintiff did not prove that this was done in any case where the amount of the taxes did not exceed the value of the property. On the contrary, the evidence indicated that these compromises were made only in cases where it would have been impossible to collect the full amount of the taxes. The compromises were made under a rule that bonds could be used only to pay back taxes and current taxes must be paid in cash. The net effect was that property was brought back upon the tax rolls which had theretofore failed to pay taxes and current taxes were realized which would otherwise have been lost.

While the practice of acceptance of bonds in payment of taxes might be so abused as to constitute an invasion of the constitutional rights of the remaining bondholders, no such case was made out below.

At the time of the hearing below, the Municipal Finance Commission had adopted a policy of refusing to approve tax settlements in any cases where any bondholders objected, and all compromises in the Borough of Runnemede to which the Commission had theretofore given its consent had been completed.

Summary of Point III that the Three-Judge Court was without jurisdiction because no substantial case was made for an injunction against state officers in the enforcement of a state statute.

A. As to the Jurisdiction of the Three-Judge Court with Respect to the Stay Provisions.

Section 266 of the Judicial Code provides in substance that no interlocutory or following final injunction suspending or restraining the enforcement, operation or execution

of a statute of a state by restraining the action of an officer of such state in the enforcement or execution of such statute upon the ground of the unconstitutionality of such statute shall be issued except after a hearing by three judges.

It is not enough to give the three-judge court jurisdiction that the plaintiff make an empty prayer in the language of the statute. Unless a substantial question is presented, the three-judge court is without jurisdiction, and if it has taken jurisdiction and issued the injunction, this Court will reverse its decree. (*Gully* v. *Interstate Natural Gas Company*, 292 U. S. 16 (1934)).

The defendants moved below to remit the case to a single district judge but the three-judge court retained and decided the case.

In so far as the stay provisions are concerned, we submit with great respect that there never was the remotest possibility that the plaintiff would be entitled to an injunction against state officers in this case. The only state officers who are defendants are members of the Municipal Finance Commission. They have no power under the statute to execute or enforce or relax the stays complained of. So far as an application for an injunction against the enforcement of the stays is concerned, the members of the Commission are misjoined as defendants. They are not even proper parties.

The injunction awarded by the court below against the Commission's functioning to any extent that "may be inconsistent with the right of the complainant to enforce in the manner herein stated executions to be issued in this court" has no substance to act upon because the Municipal Finance Commission has no statutory power to function in any way inconsistent with such a right.

It is true that in words the statute puts the stays into existence "whenever the Municipal Finance Commission shall function in any municipality", so that one who dealt only with words and not with substance might say that if the Commission did not carry on any of its functions within the municipality the stays would fall, but the court below provided in its injunction, as it was bound to, that it was

without prejudice "to any of the powers or duties of the Municipal Finance Commission under the Municipal Finance Commission Act except as the stays therein contained affect the right of the complainant to enforce its judgment" (R. 96). The Commission is therefore still properly functioning in the municipality and there is no basis even for the verbal argument.

Even if the stays were unconstitutional and cessation to function would *ipso facto* vacate them, that would not give the court jurisdiction to enjoin the activities of the Commission, constitutional and beneficial in themselves, which go to make up its functioning.

As there was no substantial question as to the liability of state officers to an injunction, the three-judge court not only lacked jurisdiction to entertain the application for the injunction but also lacked jurisdiction to entertain the incidental application for a declaratory judgment.

B. Summary as to the Jurisdiction of the Three-Judge Court with Respect to Provisions for Acceptance of Bonds in Payment of Taxes.

This branch of the relief requested comes a little nearer to substance than the preceding one because the members of the Municipal Finance Commission would be proper parties to an injunction against the acceptance of bonds in payment of taxes in view of the fact that their consent is necessary in cases where more than $500. is involved. (Act Concerning Municipal Finances, Sec. 212.) They are, however, parties so highly unnecessary that there joinder is clearly colorable for the purpose of ousting the one-judge district court of jurisdiction.

No state of facts can be supposed under which the plaintiff would be entitled to an injunction against the Commission's consenting to the compromise where it would not also be entitled to an injunction against the tax collector's consummating the compromise. The tax collector cannot make the compromise without directions from the borough council, but the borough council which makes the compromise

is omitted, while the Municipal Finance Commission which, at most, can consent to it, is joined.

Mere nominal joinder of state officials in a case where the substantial relief is an injunction against local officials does not require the convening of a three-judge court. (*Pleasant* v. *Missouri-Kansas-Texas Ry.*, 66 F. 2d 842 (C. C. A. 10, 1933), *cert.* denied 291 U. S. 659 (1934)).

In matters involving diversity of citizenship, the joinder of unnecessary parties is disregarded. (*Rogers* v. *Penobscot Mining Company*, 154 Fed. 606 (C. C. A. 8, 1907); *Salem Trust Company* v. *Manufacturers' Finance Co.*, 264 U. S. 182, 190 (1924)). We submit that the same rule should apply here.

As there was no substantial reason for joining state officers in the application for the injunction against the acceptance of bonds in payment of taxes, the three-judge court not only lacked jurisdiction to entertain the application for an injunction against the state officers but also lacked jurisdiction to entertain the application for the same injunction against local officers and the incidental application for a declaratory judgment.

POINT I.

The court erred in rendering the declaratory judgment that the stay provisions of the Act Concerning Municipal Finances are unconstitutional and in issuing the injunction based thereon.

A. In general.

a. The effect of the decision below.

The court's sentence on this branch of the case is somewhat delphic in character. The stay provisions are held unconstitutional "in so far as they affect the right of the complainant to enforce its judgment obtained and entered (or to be obtained and entered) in this Court" (R. 96, parenthetical matter from R. 99). The Municipal Finance

Commission is enjoined from "functioning in the Borough of Runnemede, New Jersey, to the extent that such functioning may be inconsistent with the right of the complainant to enforce its execution (or executions to be issued in this Court) * * *, but without prejudice to any of the powers or duties of the Municipal Finance Commission under the Municipal Finance Commission Act except as the stays therein contained affect the right of the complainant to enforce its judgment" (R. 96, parenthetical matter from R. 99).

The only way that we can think of in which the stay provisions might affect the right of the complainant to enforce a judgment in the federal court would be by the voluntary adoption of those stay provisions as a matter of comity between the United States of America and the State of New Jersey. The Act Concerning Municipal Finances does not purport to bind the federal courts.

There is no way that we can think of in which the functioning of the Municipal Finance Commission in the Borough of Runnemede may be inconsistent with the right of the plaintiff to enforce its execution in this Court.

Thus, if we pay strict heed to the words qualifying the declaratory judgment and to the words qualifying the injunction, nothing seems to have been determined and nothing seems to have been enjoined. However, the State of New Jersey cannot remain passive in the face of a statement of a court of the United States that one of its statutes is unconstitutional, and this appeal is therefore being prosecuted.

The nature of these stays is this. Whenever a municipality has been brought under the supervision of the Municipal Finance Commission, the Article on Remedies, being Sections 351-355, inclusive, of the New Jersey Act Concerning Municipal Finances (Chapter 340 of the Laws of 1931, quoted in full in the Appendix; *infra*, pp. 107-110), stays executions (Sec. 351), stays mandamus proceedings except those brought for the benefit of all creditors (Sec.

352), and stays proceedings for the distribution of funds pending a proceeding for the determination of the ownership thereof (Sec. 354). All of these stays are subject to being vacated, modified or restricted by the court upon the application of any creditor upon notice to the municipality and to the Commission (Sec. 355). The net result of these provisions is to prevent the use of the process of the New Jersey courts as a means of obtaining preferences for individual creditors and to empower the New Jersey courts to use their process for the benefit of all creditors equally and ratably.

These stays have been held constitutional by the New Jersey Court of Errors and Appeals, the highest court of that state, in *Hourigan* v. *North Bergen Township* (113 N. J. Law, 143, 172 Atl. 193, concurring opinion 172 Atl. 785 (1934)). The federal courts under their discretionary jurisdiction in mandamus, and without the benefit of any such statute, have powers to withhold relief which are at least as broad as those given by the statute to the New Jersey courts.

This rule of law of the federal courts was applied by the Circuit Court of Appeals for the Third Circuit in a mandamus case where the present counsel for the plaintiff was counsel for the relators, *City of Asbury Park* v. *Christmas*, 78 F. 2d 1003 (C. C. A. 3, 1935) *cert.* denied 296 U. S. 624 (1935). The entire opinion reads as follows:

> "BUFFINGTON, Circuit Judge.
>
> "Assuming for present purposes the power of the court below in ordinary cases to issue a writ of mandamus upon a municipality to aid a judgment creditor in enforcing such judgment, it still remains the law, as stated by the Supreme Court of the United States in Duncan Townsite Co. *v.* Lane, 245 U. S. 308, 311, 38 S. Ct. 99, 101, 62 L. Ed. 309, that: 'Mandamus is an extraordinary remedial process which is awarded, not as a matter of right, but in the exercise of a sound judicial discretion. It issues to remedy a wrong, not to promote one; to compel the performance of a duty which ought to be performed, not to

> direct an act which will work a public or private mischief or will be within the strict letter of the law but in disregard of its spirit.'
>
> "After due consideration, we are of opinion that sound judicial discretion does not warrant the exercise of such power at this time. In view of the efforts that are being made—we assume in good faith—by this municipality to provide to the limit of its power for the equality of treatment to all bondholders, we vacate the mandamus order granted, but direct the court to retain jurisdiction of the petition for the present."

As appears from the record in *Asbury Park* v. *Christmas*, *supra*, the mandamus order which the Circuit Court of Appeals vacated, required the payment of the relators' judgment of $1,418,104.63 in equal parts over each of the next ten years.

Subsequent history of the *Asbury Park* litigation furnishes a good example of the beneficent results which may be attained by cooperation between the federal courts, armed with their discretion in mandamus, a body such as a municipal finance commission, armed with its statistical facilities, and state courts, armed, as are the New Jersey courts, with a statute like the Act Concerning Municipal Finances. That history appears in the opinion in the case of *Rippel* v. *Asbury Park* (118 N. J. Law 45, 190 Atl. 489 (1937)).

It appears from that opinion that after the decision of the Circuit Court of Appeals in *Asbury Park* v. *Christmas*, *supra*, the Municipal Finance Commission in accordance with Section 201 of the Act Concerning Municipal Finances (*infra*, p. 93) formulated and certified to the governing body of the municipality resolutions providing for the refunding of its indebtedness by the issuance of bonds under a plan calling for a debt service levy in the year 1937 and each year thereafter sufficient to render an actual annual yield of $630,000. Thereupon the United States District Court for the District of New Jersey on December 29, 1936

when the *Christmas* case came back to it, granted a peremptory writ of mandamus to compel an annual tax levy in the sum of $87,381., the non-resident relators' proportion share of the yearly debt service levy thus proposed by the Finance Commission. Thereafter the Commission filed a petition in the New Jersey courts praying for a mandamus directing the municipality to make an additional annual tax levy of $542,619., the balance of the debt service, invoking the authority conferred by Section 352 of the Act Concerning Municipal Finances, one of the "stay" provisions which authorizes the Commission to institute mandamus or other appropriate proceedings for the payment of the principal or interest of indebtedness found to be outstanding. The city resisted the imposition of the terms of the Commission's refinancing plan and objected to the amount fixed for debt service as excessive. The State Supreme Court, however, as the United States District Court had done, awarded a mandamus corresponding within the penny to the refunding plan prepared by the Commission, Justice Heher saying as follows (pp. 48-49):

> "The statutory scheme was designed to secure, through the agency of the finance commission, a formula for liquidation, as speedily as may be reasonably possible, of the obligations in default. The commission is charged with the duty of attaining economic stability, without a cessation of essential municipal function, through a solvent that will also provide to the unsatisfied creditor every reasonable remedy for the enforcement of his contract. Considerations of public policy, grounded in a sound economy, ordain that the taxing power shall be reasonably used. Its unbridled exercise ordinarily frustrates the ultimate purpose, to say nothing of the hardship and loss inflicted upon the taxpayer, and pushing it to the extreme in an attempt to raise the moneys necessary for the satisfaction of a relatively large indebtedness ofttimes renders the remedy inefficacious, as well as subversive of the public interest. Such is plainly the genius of the statute, enacted as an emergency measure. A departure from this prin-

ciple to the detriment of the creditors would clearly infringe the constitutional guaranties against impairment of the obligation of their contracts.

"And so, it is the duty of this court, in the circumstances, to award *mandamus* for the enforcement of these contracts. *See Hourigan* v. *North Bergen Township*, 113 N. J. L. 143.

"In respect of the *quantum* of the levy, we are of opinion that the finance commission has reasonably measured the ability of the municipality to liquidate its obligations. It is the result of a long, painstaking and disinterested study of its financial problems; and we find nothing in the proofs to justify the claim of exaggeration.

"Moreover, the award of a *mandamus* for the sum requested by the commission will serve the essential statutory policy of equality between creditors of the same class. It puts the resident and non-resident creditors upon the same footing. It is of no consequence that the former's claims have not been reduced to judgment. Section 352 of the statute, supra, expressly so provides. Parity is the manifest design of this provision."

For aught that appears in the decree below, the New Jersey Supreme Court may lawfully continue to resist claims for preferences against embarrassed municipalities and to enforce petitions for omnibus tax levies, and the federal district courts may continue to exercise their discretion in mandamus by refusing the aid of the writ to preferential claims and by issuing the writ in such amount and in such form as will correspond with the constructive plans of a state administrative agency and the decree of the state court based upon those plans. Circuit Judge Davis, who is one of the members of the Circuit Court of Appeals which enunciated the principle of discretion in mandamus in the *Christmas* case, and District Judge Forman, who thereupon exercised his discretion in cooperation with the Municipal Finance Commission, were two of the members of the three-judge court below which held the stay

unconstitutional. If their views had changed since their decisions in the *Asbury Park* case, in fairness to the public they would not have let the matter pass *sub silentio* in deciding the case at bar.

While we are justified in assuming that their views are not inconsistent with those expressed in the *Christmas* case, we do not know what the decision below means. We cannot assign any effect to the holding that the stay provisions of the Act Concerning Municipal Finances are unconstitutional in so far as they affect the right of the plaintiff to enforce in this court a judgment on its bonds. They do not purport to have any direct effect in the federal courts, and we concede now, as we conceded below, that the legislature could not, if it tried, give them any such direct effect.

On the other hand, the statement in the decree that the stays are unconstitutional seriously interferes with the usefulness of the statute, and we must therefore develop some interpretation of the decree in order that we may attack it. Such a procedure is hardly distinguishable from setting up a straw man and knocking him down, but we have no choice. Following this course we shall proceed upon the theory that what the court below did was to hold (although expressly limiting its decision to the effect of the stays in the United States District Court) that the stays as applied in the only place where they are directly applicable, the state courts, are unconstitutional, and that since they are unconstitutional in the state courts, it would be unconstitutional for the federal courts to enforce them as a matter of comity.

We do not see how this question could ever arise unless the United States District Court for the District of New Jersey deliberately set out to render an invalid judgment, for it could accomplish by its constitutional discretion in mandamus everything that could be accomplished by an unconstitutional adoption of the New Jersey statutory stays as a matter of comity. The court has spoken, however, and we shall proceed to a discussion of the constitutionality of the stays as applied in the New Jersey state courts.

b. *The three-fold purpose and the provisions of the New Jersey Act Concerning Municipal Finances.*

The New Jersey Act Concerning Municipal Finances is an attempt of that state to apply to the insolvency of municipalities the principles which have made the equity receivership a solution of the problem of the insolvency of public service corporations.* In *Hourigan* v. *North Bergen Township* (113 N. J. Law 143, 172 Atl. 193, *supra*), Justice Heher at page 149 referred to the similarity of the position of the Commission to that of a receiver. He said:

> "The act confers upon the finance commission in respect of the municipality's financial affairs powers somewhat akin to those exercised by receivers of insolvent corporations. It was designed to give support to the tottering municipalities, and to prevent complete collapse and total paralysis of function. It embodies wise and useful provisions tending to restrain and check the reckless levy of taxes, and to promote economy and the orderly conduct of the municipality's affairs. Its primary purpose is to keep intact the corporate structure, and to continue municipal function until rehabilitation can be affected."

The three elements of the equity receivership which the New Jersey Legislature attempted to embody in the Act were, first, putting someone in control of the management of the property, second, concerted action in behalf of the creditors, aided by a prohibition of destructive action by individual creditors seeking preferences, and, third, a workable realization by the creditors of that which the debtor can pay through a settlement binding upon all.

All three of these elements are as necessary in the case of municipal insolvencies as in the case of private insolvencies.

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* For discussions of state legislation dealing with insolvent municipalities and particular reference to the New Jersey plan, see "Comity by the Federal Courts to State Statutory Receiverships of Defaulting Municipalities", 45 Yale Law Journal 702; "Municipal Debt Adjustment and the Supreme Court", 46 Yale Law Journal 199, 212; "Legal Problems of Financially Embarrassed Municipalities", 38 Virginia Law Review 39; and 13 New York University Law Quarterly 454 (1936).

cies. First, if there is no outside management or control of the insolvent municipality the creditors cannot get impartial information or impartial treatment during the period of negotiation. Second, if individual bondholders are permitted to bring individual mandamus proceedings the going value of the municipality will be seriously reduced and there will be no hope for a settlement short of a time when the parties have done each other so much harm that all are willing to get together on a reasonable settlement. And, third, if there is no way of making the settlement binding upon all creditors alike, it will be no settlement at all.

1. Control of Current Finances.

The first element of the equity receivership concept, outside control of the current finances, is supplied by the creation of the Municipal Finance Commission. Under Section 101 of the Act (*infra*, p. 91), whenever there is proof before a justice of the Supreme Court from any petition filed by a bondholder that a municipality has defaulted for over sixty days on its bonds, the justice is empowered to make an investigation, and upon a finding of the existence of such a default, the Municipal Finance Commission, consisting of the Attorney General, the State Tax Commissioner and the Commissioner of Municipal Accounts, thereafter shall have and exercise with respect to such municipality the powers and duties prescribed by the Act. Another way of bringing the Commission into existence with respect to any particular municipality is by filing with a justice of the Supreme Court a certified copy of a resolution adopted by the governing body of the municipality reciting its inability to meet its obligations. Thereupon the justice after investigation may make such a finding. The Commission thereupon comes into existence with respect to the municipality.

By Section 209 (*infra*, p. 96), the consent of the Commission is required to any action creating any obligation or indebtedness of the municipality except tax anticipation

obligations for the current year, and the governing body cannot without the consent of the Commission include in any appropriation amounts for local expenditures in excess of the like amounts for the preceding year except debt service appropriations. No claims can be paid by the municipality until the Commission's auditor shall have certified that they are within the proper appropriations and that there is or will be sufficient ready funds for such payment.

By Section 212 (*infra*, p. 102), the consent of the Commission is required for the compromise of delinquent taxes and assessments in excess of $500. By Section 213 (*infra*, p. 102), such consent is required for the sale of tax sale certificates or other property in the municipality. By Section 302-a (*infra*, p. 105) all instruments for the payment of funds of the municipality must be countersigned by the auditor of the Commission. By Section 303 (*infra*, p. 106) the Commission is entitled to notice of all appeals from taxation affecting the municipality, and is entitled to be represented thereon. By Section 306 (*infra*, p. 106) the Commission is empowered to require revision of the municipal assessments. By a supplement to the Act added by Chapter 194 of the Laws of 1935 (*infra*, p. 118) the Commission is empowered to approve agreements between the municipality and the taxpayer providing for payment of assessments for benefits for local improvements in five installments instead of all at once.

By Section 1 of a supplement to the Act added by Chapter 292 of the Laws of 1935 (*infra*, p. 121), the Commission's auditor may be given by the Commission authority to recommend the tentative annual budget to the governing body, to review all contracts prior to their execution and their authorization by the governing body, to make recommendations concerning all capital improvements, to attend all meetings of the governing body with the right to take part in discussions, to investigate the affairs of any department, officer or employee of the municipality and to make

recommendations with respect to all such matters, both to the municipality and to the Commission. By Section 3 of that supplement the Commission is required to certify by resolution to the governing body any failure on the part of an officer or employee of the municipality to perform any duty imposed upon such officer or employee by law, and unless the employee performs the same, the municipality is required to remove or suspend such employee, and in that event, the municipality is required to appoint a substitute satisfactory to the Commission. By Section 4 the Commission is empowered to require the appointment of special collectors of delinquent taxes satisfactory to it. By Section 5 the Commission is empowered to require that the proceeds of any taxes shall be applied equally and ratably to the purposes for which the taxes were levied.

With those powers, the Commission is enabled to procure accurate information about the municipal finances for the use of the creditors, and by supervision of expenditures and tax collection enforcement to afford to some extent the required concrete demonstration of the municipality's tax paying capacity. So much for the first element of the equity receivership—outside control of the debtor.

2. Abolition of the Race of Diligence.

The second element of the equity receivership, concerted action in respect of all creditors, is the one involved in the stay provisions. Concerted action on behalf of all creditors is impossible without a prohibition of any action by individual creditors seeking preferences, for it has been that sort of harassing and fruitless litigation which has in the past done the most damage, not merely to the municipality, but to the interests of the creditors themselves. Creditors of private corporations long ago came to an appreciation of the futility of the uncontrolled use of the judicial process in the attempt of each creditor to realize first on his claim, but it is only since municipal obligations have become more widely distributed among investors that the majority of municipal creditors have come to a similar appreciation.

With the creditors obtaining court orders prying off pieces of the taxing power for their separate benefit, with attempts to levy execution on municipal property, and with bickering over what constitute free funds and what essential governmental property, the operation of a municipality is rendered difficult and creditors and municipal officials get irritated with each other. Under these conditions it is impossible for them to work out any plan under which the maximum amount which the municipality can pay to the creditors can be ascertained and paid over to them.

Where creditors have seen a competing creditor obtain payment in full by some adroit use of legal process, they are not in a frame of mind to consent to a postponement of their payments, and where municipal officials have found themselves collecting taxes to be applied in accordance with half a dozen court orders obtained by half a dozen different creditors, they have not been very willing to exert themselves to raise something over and above bare needs of operation of the city.

The first object in a program to rehabilitate an insolvent municipality is, therefore, to secure a period of peace during which the factors affecting the merits of a reorganization may be considered by the municipality and its creditors. The way to obtain that period of peace seems reasonably clear. State legislation should be adopted permitting any creditor or the state commission to institute proceedings to enforce the municipality's taxing power for the benefit of all the creditors. Provision may also be made to permit proceedings to determine the rights of creditors *inter sese* with regard to moneys available for debt service pending settlement. All proceedings for the benefit of individual creditors, as opposed to the whole group of creditors, should, except under extraordinary circumstances, be stayed. Such legislation furnishes to the municipality and to the creditors substantially the protection afforded private corporations and their creditors by an equity receivership which places the corporation's property in *custodia legis*.

That is just what the Act Concerning Municipal Finances has done by its Article III-A, entitled "Remedies", embodying Sections 351-355, inclusive (*infra* p. 107). By Section 351 (*infra* p. 107) whenever a municipality is under the supervision of the Municipal Finance Commission, no levy can be enforced against it without a special order of the Supreme Court after notice to the Commission. By Section 352 (*infra* p. 108) all mandamus proceedings for the assessment, levy or collection of taxes are stayed except that, first, the Supreme Court after notice to the Commission may authorize a creditor to bring a proceeding on behalf of all creditors to which all creditors and the Commission shall be parties, and except that, second, the Commission may bring and maintain such a proceeding for the collection of taxes for the payment of all of the municipality's indebtedness. By Section 353 (*infra* p. 109) the Commission is empowered to require the municipality to pay into designated banks taxes collected in excess of running expenses. By Section 354 (*infra* p. 109) actions or proceedings affecting the disposition of the funds of the municipality are stayed except that the municipality must apply on direction of the Commission, and a creditor may apply with the court's permission, to the Supreme Court to determine the application of funds among its creditors. In any such proceedings all creditors of the municipality are parties. Section 355 (*infra* p. 110) provides that upon the application of any creditor made upon notice to the municipality and the Commission, the Supreme Court may *vacate, modify or restrict any statutory stay* contained in the article.

It seems reasonably certain that these provisions give in the case of insolvent municipalities substantially that period of peace which permits the smooth functioning and final success of the ordinary equity receivership. But the question is not whether they are beneficial but whether they are constitutional. That is the question raised by this appeal and the question which will be discussed at the end of this point.

3. The Settlement Binding upon All.

By a supplement enacted by Chapter 331 of the Laws of 1933 (*infra* p. 113) it is provided that in the case of any municipality under the supervision of the Municipal Finance Commission, creditors may petition the Supreme Court for the approval of a plan of adjustment or composition of the claims of creditors. The municipality and the Commission must be made parties to the proceeding as well as all creditors. If the plan is approved by the Commission and by creditors representing 85% in amount of the indebtedness affected thereby, the Supreme Court may give its approval if it determines that the municipality is unable to pay its obligations in full, that the adjustment is measured by the capacity of the municipality to pay, that it is in the interest of all creditors affected thereby, and that it is not detrimental to other creditors of the municipality. Upon such approval the plan becomes binding upon all the creditors included therein. It is expressly provided that the Commission shall not approve any adjustment or composition which provides for the reduction in the principal amount of any outstanding notes or bonds of the municipality.

The constitutionality of the provisions making such a composition binding upon all of the creditors has not been tested, but there would seem to be a good chance of their being sustained on the same theory that this Court sustained the Canadian composition statute in *Canada Southern Ry.* v. *Gebhard* (109 U. S. 527 (1883), cited with approval in *Continental Illinois National Bank* v. *Chicago, R. I. & P. Ry.*, 294 U. S. 648 (1935)).

The importance of these composition provisions is not nearly so great as it was when they were first adopted in view of the passage and upholding of the second Federal Municipal Bankruptcy Act in the meantime. (*United States* v. *Bekins, et al.*, 304 U. S. 27 (1938)).

A supplement to the Act Concerning Municipal Finances contained in Chapter 190 of the Laws of 1935 (*infra* p. 117)

permits any municipality which is under the supervision of the Commission to take advantage of the Federal Municipal Bankruptcy Act provided the plan is approved by the Commission and provided that the plan does not involve the reduction in principal amount of any outstanding notes or bonds of the municipality.

c. *The Constitutionality of the Stay Provisions.*

While the composition provisions of the New Jersey Act Concerning Municipal Finances have thus lost some of their importance by reason of the upholding of the Federal Municipal Bankruptcy Act, the provisions for stays have gained in importance. Until 51% of the creditors of the municipality come into agreement and thus bring into play a provision of the Federal Municipal Bankruptcy Act (Title 11, U. S. C. Sec. 403-c, 50 Stat. 657) authorizing the issuance of ancillary injunctions against hostile creditors, such hostile creditors, so far as the Federal Act is concerned, have a free and untrammelled right to pursue a rule-or-ruin policy while their more constructively minded fellows are trying to get together the 51% necessary to end chaos by the rule of law. If even a very small group is bent upon obtaining a preference over fellow creditors, the others who have no such inclination by nature are nevertheless, from motives of self-preservation, forced into the position of bringing proceedings for their individual benefit.

Thus, the discretionary power of the federal courts to withhold writs of mandamus sustained in *Asbury Park* v. *Christmas*, 78 F. 2d 1003, *supra*, is a valuable supplement to the Federal Municipal Bankruptcy Act in the hands of a skillful and broad-minded district judge exercising his discretion in favor of a plan of composition which, he is satisfied, is fair and has been put forward in good faith. Such a judge is thus empowered to impose so far as the federal courts are concerned, the period of peace necessary for a majority of the creditors to get together and present their plan to the court.

The stay provisions of the New Jersey Act Concerning Municipal Finances permit a New Jersey Supreme Court judge to do precisely the same thing so far as the New Jersey courts are concerned.

There is a slight difference in that the federal judge himself imposes the stay by refusing to act unless he comes to the conclusion that justice requires the issuance of the writ of mandamus, while, in the case of proceedings against insolvent municipalities in the state courts, there is a statutory stay unless the court comes to the conclusion that justice requires the issuance of the writ of mandamus.

That, however, does not explain why a federal court, like the court below which exercises the power to suspend creditors' individual mandamus proceedings against insolvent municipalities, should have held unconstitutional a statute of the State of New Jersey which gives in effect the same power to the New Jersey courts. Judges who reached such liberal and constructive results in the *Asbury Park* case must have felt bound by some very positive rules of law to have reached the result below. No cases were cited so that we lack that clue.

Counsel for the plaintiff in the court below argued that under the New Jersey law, whatever might be the law of the federal courts, there was no discretion in the judicial exercise of municipal creditors' remedies, and since that was the law at the time the plaintiff purchased its bonds, it was unconstitutional for a subsequent statute to confer discretion upon the New Jersey courts.

Plaintiff below grounded its claim that there was no discretion in the enforcement of municipal creditors' remedies under the New Jersey state law upon the case of *Rahway* v. *Munday*, 44 N. J. Law 395, decided by the Court of Errors and Appeals in 1882.

The court in that case did say (p. 420):

> "The allowance of the writ of *mandamus* is certainly, in some cases, an act resting in judicial discretion, but such right of judgment does not embrace the

province of supervising legislative acts creating private rights, and of refusing, occasionally, to put them in force from motives of supposed expediency or public policy. It would be difficult to find any sanction in reason or in judicial decisions for such an exercise of judicial authority."

The New Jersey Court of Errors and Appeals in *Rahway* v. *Munday* was thus careful to state that the writ of mandamus was in some cases an act resting in judicial discretion. In so far as it held that New Jersey bondholders had a vested right in preferential payments which could not be tempered by the discretion in mandamus, the case rests upon *City of Galena* v. *Amy*, 5 Wall. 705 (1866) which the court cited on page 419. That case was decided by this court before the establishing of the discretion of the federal courts in mandamus to temper the rigor of the writ by spreading a tax levy to pay a judgment over a series of years instead of assessing it all at once as required by the statute. That doctrine has since gained complete acceptance in all of the federal courts. (*East St. Louis* v. *Amy*, 120 U. S. 600 (1887); *Deere* v. *Board of Commissioners of Rio Grande County*, 33 Fed. 823 (C. C. D. Colo., 1888); *United States* v. *City of Key West*, 78 Fed. 88 (C. C. A. 5, 1896); *City of Cleveland, Tenn.* v. *United States*, 166 Fed. 677 (C. C. A. 6, 1909); *Graham* v. *Quinlan*, 207 Fed. 268 (C. C. A. 6, 1913); *Perry* v. *Town of Samson*, 11 F. 2d 655 (D. C. M. D. Ala., 1926), aff'd. 17 F. 2d 1 (C. C. A. 5, 1927)).

Moreover the statement in *Rahway* v. *Munday* was made before the decision of the Court of Errors and Appeals of New Jersey in *Vanderpoel* v. *Borough of Mt. Ephraim*, 111 N. J. Law 423, 168 Atl. 575 (1933).

The *Vanderpoel* case is of immense importance because it represents an acceptance by the New Jersey Court of Errors and Appeals of the modern doctrine that municipal creditors rank *pari passu* in the case of insolvency. If *Rahway* v. *Munday* established the absolute right of a municipal creditor to a tax levy for himself alone, that right fell when the same court recognized that one creditor had

no right to a preference over his fellows. In the *Vanderpool* case the plaintiff recovered judgment upon defaulted bonds. Execution was then levied upon a savings and bond interest account of the borough. The Court of Errors and Appeals in vacating the levy said at page 424:

"The judgment creditor in this case was the holder of defaulted bonds; if he may seize funds which are to be devoted to the payment of bonds generally he secured by his vigilance an advantage over all other bondholders.

"Municipal credit has been established by the creation of sinking funds for the liquidation of debts when due. If such funds may be taken by one bondholder for his own advantage other bondholders must be delayed in the collection of their claims. The municipal credit must necessarily suffer if bondholders do not have equal rights in the funds created for the liquidation of their claims. We can find nothing in the Execution act which would give rise to the implication that such funds can be the subject of seizure at the suit of a judgment creditor, but if there is we still think that the result would be ruinous.

"All bondholders for whose satisfaction a fund was created have equal rights therein. Any other rule would result in one creditor having immediate satisfaction while another would be obliged to wait until, in the course of time, a collection of taxes could be made. Nothing would more surely impair municipal credit than the knowledge that before the law all bondholders were not given equal rights in the funds set aside for the liquidation of claims.

"It is essential to the beneficial exercise of granted powers that a municipality be able to secure advances upon its credit. Even though it failed in meeting its obligations when due because too much has been extended upon the hope that its inhabitants could earn money sufficient to pay taxes, still it is essential that the municipality deal justly with its creditors and preferences, however secured, are not to be so regarded.

"Construing the Execution act strictly as we must, we can find nothing in it which gives one creditor a

right to take public property in satisfaction of a judgment even though it be money, part of which may have been set aside to satisfy his claim."

It is true that the court in the *Vanderpoel* case was deal-g with an attempt to get a preferential payment out of fund then in existence rather than with an attempt to get preferential payment out of the general taxing power, but is plain from the court's language that it would regard an tempt to get a preferential payment out of the general xing power as an *a fortiori* case—"It is essential that the unicipality deal justly with its creditors and preferences *wever secured* are not to be so regarded"—"we can find thing in it (the Execution Act) which gives one creditor right to take public property in satisfaction of a judg-ent *even though* it be money, part of which may have been t aside to satisfy his claim."

The plaintiff in the court below cited *Hourigan* v. *North rgen Township*, 113 N. J. Law 143, 172 Atl. 193, concur-ng opinion 172 Atl. 785, *supra*, as repudiating this doctrine at creditors have a common law right to be protected ainst the obtaining of preferential payments from insol-nt municipalities. The case did nothing of the kind. In e Supreme Court (11 N. J. Misc. R. 194) a municipal judg-ent creditor was denied mandamus on the ground, among hers, that the granting of the writ in the particular case ould work confusion in the financial affairs of the munici-lity. In saying *obiter* that that was not a sufficient basis r withholding the writ, six judges of the Court of Errors d Appeals, in the course of their discussion of the con-ruction of the tax statute, cited *Rahway* v. *Munday*, 44 J. Law 395, *supra*, for the proposition that the statute ade no allowance for the pecuniary embarrassments or e insolvency of the corporation. Their opinion then pro-eded, saying (p. 147):

"We come now to a consideration of the constitu-tional questions raised."

The constitutional questions raised involved the constitutionality of the stays contained in the Act Concerning Municipal Finances. The court considered whether the Act Concerning Municipal Finances was valid in permanently and completely staying mandamus proceedings on behalf of individual creditors and remitting them to an application to the Supreme Court for leave to bring a mandamus proceeding on behalf of themselves and all others similarly situated. At that time the statute did not contain the present Section 355 (*infra*, p. 110) which authorizes the Supreme Court to relax the stay against the institution of individual mandamus proceedings.

In discussing those constitutional questions, *Rahway v. Munday* was not cited. Instead the opinion proceeded (p. 148):

> "Assuming, without deciding, that the statute, in this respect, lessens, in the constitutional sense, the efficacy of the means provided for the enforcement of the contract at the time it was made, it is nevertheless, for the reason to be stated, a valid exercise of the legislative power. It was adopted as an emergency measure."

These six judges thus voted to sustain the stay provisions of the Act Concerning Municipal Finances on the ground that, whether or not the stays impaired the obligation of the bondholders' contract, they were justified by the emergency, under the decision of this court in *Home Building and Loan Association* v. *Blaisdell*, 290 U. S. 398 (1934). Six judges voted that the stay provisions were unconstitutional, and the thirteenth, who held the balance of power, Mr. Justice Donges, voted to sustain the statute but filed a concurring opinion in which he justified it on the ground that the stays did not impair the obligation of the bondholders' contract. Thus, neither of the opinions in the case is the opinion of the court, but that of Mr. Justice Donges passed on a question which the six judges who voted with him left open, and we submit that the cogency of his arguments is such that his six associates would have follow

him had they not found it unnecessary to pass upon the question.

Mr. Justice Donges held (p. 154):

> "The statute under consideration does not take away the remedy, but affords the creditor an ample remedy, namely, recourse to the Supreme Court to compel payment."

The view of Mr. Justice Donges was thus that even though the Supreme Court had been deprived of jurisdiction to permit the prosecution of a mandamus proceeding by an individual creditor, the substitution of the right of the individual creditor to apply to the Supreme Court for leave to bring such a proceeding on behalf of himself and his fellow creditors gave him all that he was entitled to.

This conclusion of Mr. Justice Donges was the easier to reach because of the New Jersey doctrine, recently developed in *Vanderpoel* v. *Borough of Mt. Ephraim*, 111 N. J. Law 423, 168 Atl. 575, *supra*, that no creditor of an insolvent municipality has a right to obtain a preference.

Even in the case of a private corporation, however, where no such doctrine was available, this court upheld a very similar statute in *Pittsburg Steel Company* v. *Baltimore Equitable Society*, 226 U. S. 455 (1913).

In that case the Steel Company was a contract creditor of an insolvent Maryland corporation. The Equitable Society held stock of the insolvent corporation, the subscription for which had not been paid in full. The Steel Company sued the Equitable Society to recover the balance due on a stock subscription in February, at which time the action was maintainable under Maryland law. In April, however, a statute was enacted making the stockholders' liability an asset of the insolvent corporation, saving the rights of creditors at the date of the Act, but providing that the exclusive remedy, as against Maryland stockholders, should be an action in equity on behalf of all creditors who might come in. On the basis of this statute, the Steel Company's suit was dismissed, and the decision of the Mary-

land Court of Appeals sustaining the dismissal unanimously affirmed by this Court.

The only distinction that we can see between *Pittsburg Steel Company* v. *Baltimore Equitable Society* and the case at bar is that the liability of the Equitable Society was limited to the amount of the unpaid subscription. Once it paid that amount to the insolvent corporation or its receiver, or to any creditor, it was discharged; whereas the Borough of Runnemede, after paying appellee in full, would still remain liable to pay all its other creditors in full also. We do not believe that this distinction makes any difference. The taxing power in the case of an insolvent municipality has a practical limit just as the obligation of the stock subscriber had a legal limit.

It is to be noted that in both the *Hourigan* and the *Pittsburg Steel Company* cases the Legislature had completely abolished the creditors' right to proceed by and for himself. Under the existing state of the Act Concerning Municipal Finances, however, the position of the creditor is much like his position in the federal courts, i. e., that the court has jurisdiction to permit him to proceed but may refuse. The federal courts have made only a beginning of working out, as an alternative to this absolute refusal, permission to the creditor to proceed on behalf of himself and all others similarly situated. (*Carteret County* v. *Sovereign Camp, Woodmen of the World*, 78 F. 2d 337 (C. C. A. 4, 1935); *Groner* v. *U. S. ex rel. Snower*, 73 F. 2d 126 (C. C. A. 8, 1934)). That power is conferred upon the courts by statute, however, in the case of the Act Concerning Municipal Finances, and was exercised by the New Jersey Supreme Court in *Rippel* v. *Asbury Park*, 118 N. J. Law 45, 190 Atl. 489 (1937), *supra*. Unless and until a New Jersey court refuses to exercise that power, we cannot assume that it will be refused. It is settled that the federal courts may refuse individual mandamus altogether, even though they have no settled practice under which the creditor who has been refused may proceed on behalf of

himself and his fellows. That being so, it was surely constitutional for the Legislature to empower the New Jersey courts to refuse or to grant individual mandamus where the Legislature itself outlined the alternative procedure for the creditor to take on his own behalf and that of his fellows.

The other concurring opinion in *Hourigan* v. *North Bergen Township* (113 N. J. Law 143, 172 Atl. 193, *supra*), in which Justice Heher sustained the stay provisions as justified by the emergency finds ample support in the conditions proved to exist at the time of the hearing below. Section 405 of the Act (*infra*, p. 113) states its purpose as follows:

> "405. It is declared and enacted that this act is intended by the Legislature to meet the public emergency arising from a default in the payment of municipal obligations, and the resulting impairment of public credit, requiring intervention by the State to provide for the payment of existing obligations in such a way as to cause the least embarrassment to property owners as taxpayers; that this act is remedial in nature; and that the powers hereby granted shall be liberally construed."

The testimony was that the Commission had been called upon to supervise the affairs of twelve municipalities (R. 188). Between sixty and seventy municipalities were in default in the payment of principal and interest on their debt, and in 1931, when the Act was originally passed, as many as one-third of the municipalities of the state were in that condition. At the time of the hearing below, the City of Camden had just had a complete refunding of its obligations. There was a creditors' committee in the City of Newark which had entered into a standstill agreement, the City of Atlantic City had not yet completed its refunding, the City of Asbury Park was in default in the payment of its principal and interest, and the Township of North Bergen (with a population of 40,000) was in default. Camden County and Atlantic County had both been pretty

seriously in default but both had refunded their obligations (R. 149-150).

In the *Hourigan* case, it was objected that the Act was unconstitutional even under the emergency powers because the statute did not fix a time when the stays should cease to be effective. Justice Heher replied as follows (pp. 151-152):

> "But it is not requisite that the operation of the law be limited to a definite term. It is the actual existence of the emergency solely, and not the limitation of the law's operation to a prescribed period, that gives validity to this exercise of the reserve element of sovereignty called the police power. When the emergency ceases to exist, the operation of the statute will be arrested, even though the prescribed term of its operation may not then have expired. A law depending upon the existence of an emergency, or other certain state of facts, to uphold it, may cease to operate if the emergency ceases, or the facts change, even though valid when passed. It is always open to judicial inquiry whether the exigency still exists upon which the continued operation of the law depends. The operation of the statute itself could not validly outlast the emergency. *Home Building and Loan Association* v. *Blaisdell*, 290 U. S. 398; 54 Sup. Ct. 231; 78 L. Ed. 255; *Chastleton Corporation* v. *Sinclair*, 264 U. S. 543, 547; 44 Sup. Ct. 405; 68 L. Ed. 841."

In the *Chastleton* case, which Justice Heher cited, Mr. Justice Holmes said for this Court (pp. 547-548):

> "A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed."

In the *Blaisdell* case, likewise cited by Justice Heher, Mr. Chief Justice Hughes pointed out for this Court at page 447 that the period of the stay fixed by the statute in that case could be reduced "by the order of the court

under the statute, in case of a change in circumstances, and the operation of the statute itself could not validly outlast the emergency or be so extended as virtually to destroy the contracts."

After the Act Concerning Municipal Finances had been upheld in the *Hourigan* case, Mr. Chief Justice Hughes for this Court in *W. B. Worthen Co.* v. *Thomas*, 292 U. S. 426 (1934), called attention to the fact that the rule in the *Blaisdell* case applied only to instances where the legislation was limited to the emergency and set up conditions apposite to emergency relief.

The Act Concerning Municipal Finances always set up conditions apposite to emergency relief in that the stays were effective only in municipalities which on account of insolvency had required the supervision of the Commission.

The New Jersey legislature has, since the decision of this court in *Worthen Co.* v. *Thomas*, in effect limited the legislation to the emergency, by adding Chapter 50 of the Laws of 1936 to the Act Concerning Municipal Finances. This added provision, when read in connection with Section 405 declaring the Act to be intended to meet an emergency, permits the court to limit the legislation to the emergency. The provision added is Section 355 which reads as follows:

> "355. Upon the application of any creditor made upon notice to the municipality and the commission, the Supreme Court may vacate, modify or restrict any statutory stay contained in this article."

It certainly cannot be presumed for the purpose of holding the New Jersey Act unconstitutional that the court which has the power to proceed in spite of the stays will refuse to exercise this power when the emergency ceases to exist.

A like discretion conferred upon the courts by the second Frazier-Lemke Act had great weight in the opinion of this Court in rendering the second act constitutional instead of unconstitutional like the first. (*Wright* v. *Vinton Branch*,

300 U. S. 440, 460-464 (1937); *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555 (1935)).

Perhaps all of this discussion of the New Jersey law has been beside the point as plaintiff's counsel see it. What we have been meeting is an assumed contention, assumed to have been accepted by the court below, that the statute as applied in the New Jersey courts is unconstitutional, and that it would therefore be unconstitutional to apply it in the federal courts as a matter of comity. We feel that we have demonstrated that the statute is constitutional as applicable in the New Jersey state courts and have thus met the assumed contention. It may be, however, that the plaintiff and the court below, in spite of concessions to the contrary, construe the stays as directly applicable to proceedings in the federal courts and hold that as so applied, they are unconstitutional.

We meet that by pointing out that courts will not deliberately construe a statute so as to make it unconstitutional where there is room, as here, to construe it so as to eliminate the question. (*Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531 (1914)).

Therefore, if the plaintiff in this Court takes the position that the act is only unconstitutional because of its direct application to the federal courts, this Court should hold in its opinion that the statute does not apply to the federal courts and reverse the judgment below which declares the statute unconstitutional.

B. The enumeration of the statutes which govern the manner of the plaintiff's enforcement of its execution was erroneous.

The court below (R. 96) not only issued an injunction against the Commission's functioning in the borough "to the extent that such functioning may be inconsistent with the right of the complainant to enforce its execution in the manner herein stated" and made a declaration that the stay provisions of the Act Concerning Municipal Finances

'are unconstitutional and void insofar as they affect the ight of the complainant to enforce its judgment obtained nd entered in this Court", but also made a declaration in esponse to a prayer of the plaintiff as to what the manner f enforcement should be.

The court's decree on that subject was as follows (R. 6, 97):

> "IV. In response to subdivision F of the prayers of Count One of the bill of complaint which prays that this Court hold, adjudge and declare that complainant's rights to compel a levy and collection of taxes for the satisfaction of its judgment are governed solely by Section 35 of the Execution Act of New Jersey, being 2 Compiled Statutes of New Jersey, page 2256, and Section 237 of the School Law of New Jersey, being 4 Compiled Statutes of New Jersey, page 4804.
>
> "It is Ordered, Adjudged and Decreed that the enforcement of complainant's judgment shall be in accordance with the laws existing in the State of New Jersey at the time of the issuance and sale of the bonds in question, and the laws applicable are Section 35 of the Execution Act (2 Comp. Stats. p. 2256), and Section 237 of the School Law (4 Comp. Stats. p. 4804), and that the said sections were not repealed by the provisions of the Tax Act of 1918."

Thus, in response to the plaintiff's request for a declaration that its rights were *solely* governed by Section 35 of the Execution Act and Section 237 of the School Law, the court replied that the enforcement of the judgment should be in accordance with the laws existing in the State of New Jersey at the time of the issuance and sale of the bonds and that the laws applicable were Section 35 of the Execution Act and Section 237 of the School Law, and that said sections were not repealed by the Tax Act of 1918 (N. J. Laws of 1918, Ch. 236, § 505). This was in the face of the fact that counsel for the plaintiff preliminary to this litigation had asked for action under the Tax Act (Ex. 6 to Stipulation, R. 125-126).

Counsel for the plaintiff in other litigation, *U. S. ex rel. Barker* v. *Borough of Fort Lee* (No. 6840, October Term, 1938, C. C. A. 3rd Circuit), conceded that the rights of the judgment creditor are governed to some extent by the Tax Act of 1918 and construe the decree of the court below as so holding. Their brief in that case reads:

> "Section 505 of the Tax Act (P. L. 1918, c. 236, p. 865), passed in 1918, deals with the same subject matter. Since their is no express repealer of Section 34 of the Execution Act, the old statute is repealed by implication only to the extent that it is inconsistent and the two acts must be read together. This was so held in the recent three-judge court case of *Sovereign Camp, W. O. W.* v. *Wilentz*, 23 F. Supp. 23, 29 (U. S. D. C., N. J., 1938). * * * The Execution Act provides the mechanics; the 1918 statute makes definite the date of payment over by the Collector."

Section 34 of the Execution Act referred to by counsel in the above quotation is substantially similar to Section 35 here involved, except that it applies to municipalities in general instead of to school districts.

Since the court's decree is not capable of the construction placed upon it by counsel in the quotation, the decree should certainly be modified to accord with the concession.

Such a modification will not go quite far enough, however. The Tax Act of 1918 repealed the Execution Act (as we shall hereinafter call Sections 34 and 35 of the Execution Act and Section 237 of the School Law collectively).

All four of these sections are contained on pages 85-88 of the Appendix, *infra*, the provision of the Tax Law being Section 505 of Chapter 236 of the Laws of 1918.

As an example of the inconsistency between the Execution Act and the Tax Law, the Execution Act requires that upon failure to find property subject to an execution against the municipality or school district, the execution shall be lodged with the *assessors* of the taxing district who shall assess as a tax the amount due upon the execution. The Tax Law provides that when no property can be found to satisfy

the execution issued against a taxing district, the execution shall be lodged with the *County Board of Taxation,* which shall add the amount due upon the execution to the amount certified to it to be raised by taxation. The two provisions simply cannot exist side by side. If both were in force, the effect would be that every judgment would result in two taxes, each for the full amount of the judgment, one assessed by the assessors of the taxing district, and the other by the County Board of Taxation. Yet the court below said in its opinion (R. 88, italics ours):

> "The provisions of the Tax Act of 1918 did not, by implication, repeal the above mentioned laws, upon which the complainant relies. Such repeals are not favored, and the provisions of the various statutes *are not materially inconsistent.*"

This seems to have been a palpable inadvertence.

POINT II.

The court erred in rendering the declaratory judgment that the acceptance of bonds in settlement of taxes may interfere with the enforcement of the plaintiff's judgment and in issuing the injunction based upon it.

The decree below contains the following provision (R. 98):

> "It is Ordered, Adjudged and Decreed that acceptance of bonds in settlement of taxes may materially interfere with the complainant in the enforcement of its judgment, and that defendants be and they hereby are enjoined from making settlement for taxes due and owing to the Borough of Runnemede, New Jersey, by any medium except in accordance with the laws of the State of New Jersey."

While the injunction against making settlement for taxes by any medium "except in accordance with the laws of the State of New Jersey" seems to be no more than a way of

raising the question as to what the laws of the State of New Jersey prescribe, a liberal construction of the whole paragraph indicates that all defendants are enjoined from accepting bonds in settlement of taxes.

The Borough Council of the Borough of Runnemede accepted bonds of the municipality in compromise of taxes and the Municipal Finance Commission gave its consent which was required by the terms of the statute because some of the taxes compromised exceeded $500. (See, for example, R. 226-231.)

The plaintiff's bonds were issued June 1, 1930 (R. 113). At that time the matter was governed by New Jersey Laws of 1928, Ch. 123, which provided as follows:

> "1. Whenever taxes or assessments, or both, levied and assessed against real property in this State are in arrears and unpaid and the owner of said real property or other person having an interest therein shall make application, in writing, to the governing body of the municipality in which said real property is situate for a revision, adjustment and reduction of said taxes or assessments, or both, and the said governing body shall determine that the sum of said taxes or assessments, or both, and the interest due thereon is greater in amount than the value of the real property upon which said taxes or assessments were levied, assessed and fixed, said governing body may fix and determine an amount to be accepted by such municipality in full satisfaction of the said taxes or assessments, or both, and the interest accrued thereon. If, within thirty days from the date of said determination, the petitioner shall pay to the collector of taxes or other proper officer of the municipality the amount fixed and determined as aforesaid, the said sum shall be accepted in full satisfaction of all said taxes, * * * ."

Section 212 of the Act Concerning Municipal Finances now provides as follows:

> "The governing body of any municipality in which the Commission is functioning shall have power to

compromise and adjust the whole or any part of any special assessments or taxes delinquent to the municipality; * * *. No claims of the municipality for taxes or assessments, and interest thereon, in excess of five hundred dollars, shall be compromised without the assent in writing of the Municipal Finance Commission."

Neither of these statutes expressly refers to bond compromises. Yet there is nothing in either which necessarily limits its scope to cash compromises. Surely, if taxes of $1,000. can be satisfied by the transfer of property worth $50. (and that is the import of both statutes) the same taxes can be satisfied under the same statute by the surrender of a bond selling in the market at $500.

The question is one of statutory construction quite as much as one of constitutionality.

The only extension of the right to compromise made by the statute complained of (Section 212 of the Act Concerning Municipal Finances) is that the power to compromise was limited by the old 1928 Act to cases where the taxes and interest exceeded the value of the real property on which they were levied. It was, therefore, incumbent upon the plaintiff when it asked an injunction against bond compromises which were not permitted by the law at the time the plaintiff bought its bonds to show that the transactions which had actually taken place under the new Act were of a character unauthorized by the old.

So far as there are indications in the evidence as to the relative value of the property and the taxes thereon which had been settled by the surrender of bonds, they tend toward the conclusion that the expedient was adopted only when it would result in bringing in taxes which the municipality would otherwise never have received, i. e., where the taxes exceeded the value of the property.

The uncontradicted testimony in the mandamus case of *U. S. ex rel. Woodmen of the World* v. *Board of Education of Runnemede* is that to collect money upon certain of the

properties it was necessary to compromise with the taxpayers (R. 172). In explaining the reserves against taxes it was stated that they would provide the slack which would permit cash compromises of taxes which would be necessary since bond compromises had been stopped, and that it was obvious that the municipality would eventually have to take a loss since in many cases the property was not of sufficient value to permit the municipality to collect its taxes thereon (R. 172, 175).

Even if the statutes in existence at the time of the issuance of the bonds did not permit bond compromises, a subsequent statute permitting bond compromises would not necessarily be unconstitutional. It perhaps might be so administered that an unconstitutional invasion of bondholders' rights might result. Certain bondholders might be so preferred over their fellows as to justify a complaint. There would be no basis for any injunction against all bond compromises, however, without proof that the statute had been used as an instrument of unfairness, preference or oppression. The only way in which the plaintiff could have justified the decree below would have been by convincing the court that the practice of acceptance of bonds for taxes cannot be so wisely exercised as to avoid creating an unconstitutional impairment of the contract of bondholders.

Just the contrary is the case. The device has been found to be of great value where the accumulation of arrears of taxes is greater than the property can meet without a reduction. The taxpayer is enabled to save his property and the municipality and the remaining bondholders are thus benefited by having the property kept upon the tax roll. The municipality is also benefited by the reduction of its interest burden and the remaining bondholders are benefited by the improvement of the ratio of the security to the debt. Such an operation does not extinguish any tax lien which would be available to produce cash for the remaining bondholders (R. 175), and under the imposition of the rule here imposed that the taxpayer must pay the current year's

taxes in cash and may use bonds only for preceding years (R. 171), it actually produces cash which would never otherwise be obtained.

In many cases the practice is being continued with the consent of all bondholders but the Commission does not desire to force upon the bondholders its ideas of what they want and had announced prior to the hearing below that it would not approve bond compromises except with the consent of all creditors (R. 60). All compromises theretofore approved have since been completed (R. 117).

POINT III.

Even if the stay provisions and the provisions for acceptance of bonds in payment of taxes were unconstitutional, the three-judge court was without jurisdiction because no substantial case was made out for an injunction against state officers in the enforcement of such provisions:

A. As to the jurisdiction of the three-judge court with respect to the stay provisions of the statute.

On motion of the plaintiff, a court consisting of a circuit judge and two district judges was convened below and heard and determined this suit on the theory that it was of a character which, pursuant to the provisions of Section 266 of the Judicial Code, ousted the one-judge district court of jurisdiction.

Section 266 of the Judicial Code (U. S. C. 380; 36 Stat. 557, 36 Stat. 1162, 37 Stat. 1013, 43 Stat. 938) provides as follows:

> "No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute, * * * shall be issued or granted * * * upon the ground of the unconstitutionality of such statute, unless the application for the same shall be

> presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. * * * The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; * * *."

It is not enough to give the three-judge court jurisdiction that the plaintiff make an empty prayer for an injunction against state officers in the enforcement or execution of a state statute upon the ground of the unconstitutionality of the statute. Unless a substantial question is presented the three-judge court is without jurisdiction. Where a three-judge court has improperly assumed jurisdiction it is the practice of this Court upon appeal, even though such an appeal does not bring up the merits, to exercise its appellate jurisdiction to correct the improper action. In *Gully v. Interstate Natural Gas Co.*, 292 U. S. 16 (1934), the three-judge court had granted an injunction against state officers. This Court held, on a direct appeal thereto, that no substantial question was presented as to the validity of the statute. It therefore reversed the decree below and remanded the cause to the district court for further proceedings to be taken independently of Section 266 of the Judicial Code.

In the case at bar, at the hearing upon the application for the interlocutory injunction and final injunction on October 29, 1936, a motion was made to remit the case to the district judge and decision thereon was reserved. (Order of Continuance, R. pp. 63, 64, Docket Entries, R. 1.)

The answer of the Municipal Finance Commission contained as a sixth separate defense (R. 79) a statement that no injunction in accordance with the prayers of the bill of complaint was authorized by Section 266 of the Federal Judicial Code under which the court of three judges was

ssembled because the suit was not one of those described
n that Section.

The answer of the local officials raised the same point
R. 69, 71).

On the taking of evidence in support of the application
or the interlocutory injunction and final relief, objection to
he testimony was made on the ground that no cause of action
or an injunction was stated against the Municipal Finance
ommission (R. 129).

The three-judge court, nevertheless, held as part of its
rst conclusion of law (R. 92):

> "We are satisfied that, under the provisions of Section 266 of the Judicial Code (28 U. S. C. A. sec. 380), the issues raised in the pleadings in this cause have been legally presented to a Three-Judge Court, and that this Court, as constituted, has jurisdiction to dispose of the question of preliminary injunction, as well as the determination of the issues presented by the pleadings. * * *"

All appellants assigned as error the assumption of juris-
iction by the three-judge court and the denial of the motion
o remit the suit to a single judge. (Assignments of Error,
os. 1-5, inc., 9; R. 101-102).

In spite of the conclusion of the court below, it is sub-
nitted that there never was any substantial basis for a con-
ention that the members of the Municipal Finance Com-
ission were subject to an injunction against enforcement
r execution by them of the stay provisions of the Act
oncerning Municipal Finances.

The position of the plaintiff must be that it was deprived
access to the usual forum because it sought an "injunc-
on suspending or restraining the enforcement, operation,
execution" of a statute of the state by restraining the
tion of an officer of such state "in the enforcement or
ecution of such statute * * * upon the ground of the un-
nstitutionality of such statute."

To reach this conclusion the plaintiff would have to present a cause of action entitling it to an injunction against the enforcement or execution of the stay by defendants who are state officers. This it did not do in its complaint; this it did not do in its testimony, and this it cannot do. The only state officers who are defendants are members of the Municipal Finance Commission. The members of the Municipal Finance Commission have no power under the statute to execute or enforce the stays complained of. An injunction against execution or enforcement of the stays directed against the Municipal Finance Commission would be completely ineffective. The stays would still stand in full force and effect because the party enjoined would be powerless to relax them.

The complaint does contain the empty prayer that the Municipal Finance Commission be enjoined "in the enforcement and execution" of the stay provisions and "from functioning" in the municipality (Complaint, Count Four, subdivisions C and D, R. 21).

In the face of this explicit prayer for an injunction against the enforcement and execution of the stay provisions, the court below limited its injunction (R. 99) to one restraining the Commission "from functioning in the Borough of Runnemede, New Jersey, to the extent that such functioning may be inconsistent with the right of the complainant to enforce in the manner herein stated executions to be issued in this Court * * *."

It was obviously impossible for the court below to enjoin the Municipal Finance Commission "in the enforcement and execution" of the stay provisions because there was not, and could not have been, any threat that the Commission would do anything of the kind. We do not think that the court bettered matters by restraining the Commission "from functioning in the Borough of Runnemede, New Jersey, to the extent that such functioning may be inconsistent with the right of the complainant to enforce in the manner herein stated executions to be issued in this Court * * *." The fact

that the court was forced to resort to this circumlocution to use language appropriate to an injunction is evidence that there never was any substance to the claim that a cause of action existed against the Municipal Finance Commission to restrain it "in the enforcement and execution" of the stay provisions of the statute.

Instead of being equivalent to an injunction against the enforcement or execution of the statute, the injunction awarded is completely ineffective, just as any injunction involving the stay provisions was bound to be if directed against the Municipal Finance Commission. The Municipal Finance Commission has no statutory power to "function" in the Borough of Runnemede to any extent that "may be inconsistent with the right of the complainant to enforce in the manner herein stated executions to be issued in this Court."

The stay provisions which the court below held were unconstitutional are Sections 351-355, inclusive, constituting Article III-A of the Act Concerning Municipal Finances, printed in Appendix C, pp. 107-110, *infra*. They are made applicable to school districts, both by reference and by repetition, in Chapters 195 and 258 of the Laws of 1935 (pp. 119, 132, *infra*).

The net effect of these stay provisions is: (Section 351) whenever and so long as the Commission functions in the municipality execution is stayed unless otherwise specifically ordered by the Supreme Court after notice to the Commission; (Section 352) mandamus to compel the levy of taxes is stayed except that the Supreme Court after notice to the Commission may authorize creditors to bring a proceeding for the benefit of all, and except that the Municipal Finance Commission may bring such a proceeding; and (Section 354) a proceeding may be maintained for the application and distribution of the funds of the municipality in which the Supreme Court has authority to make an order forbidding disbursement of the municipality's funds pending determination. It is provided in Section 355 that upon the applica-

tion of any creditor the Supreme Court may vacate any statutory stay contained in the article.

The members of the Municipal Finance Commission have no power under the statute to execute or enforce the stays held unconstitutional. The declaratory judgment given below that the stays are unconstitutional, although difficult to interpret, seriously interferes with the administration of the Act, and it is because of that declaratory judgment that we are appealing, but the injunction against the Commission's functioning in the borough to the extent that such functioning may be inconsistent with the right of the complainant to enforce executions to be issued in the federal court accomplishes nothing.

A verbal argument might be made in support of the effectiveness of the injunction below if it had enjoined all "functioning" of the Commission in the borough because, as a matter of phraseology, the stays are in effect in those municipalities where the Commission "functions." But the court below properly gave express permission to the Commission to continue its ordinary activities in the borough by adding this qualification to the injunction against "functioning" (R. 99):

> "* * * but without prejudice to any of the powers and duties of the Municipal Finance Commission under the Municipal Finance Commission Act except as the stays therein contained affect the right of the complainant to enforce such a judgment."

This qualification was not the result of mere abundance of caution. An injunction against *all* functioning would have forbidden activities which even the plaintiff would admit were beneficial.

For instance, the Commission is empowered (Section 306, *infra*, p. 106) to cause reassessments of the taxable property; (Section 209, *infra*, p. 96) to see that payments are within valid budget appropriations; (Section 209-a, *infra*, p. 97) to fix limits upon non-debt-service items of expenditures; (Ch. 292, L. 1935, Section 1, *infra*, p. 121)

to make recommendations with respect to the budget; (Section 3, *infra*, p. 122) to certify an officer or employee for failure to perform his duty and upon his further failure to appoint a substitute; (Section 5, *infra*, p. 123) to provide that tax collections shall be applied equally and ratably for the various purposes for which levied.

There never was the slightest chance of success in plaintiff's verbal argument that the Commission ought to be prevented from functioning *at all*. As above indicated, these stays exist "whenever the Municipal Finance Commission shall function in any municipality and so long as it shall continue so to do." The line of this verbal argument is evidently something like this: "The stay in the statute is unconstitutional and should be eliminated. The stay lasts under the literal wording of the statute only so long as the Commission functions in the municipality. We therefore ask that the unconstitutional stay be eliminated by enjoining the Commission from functioning in the municipality even though the activities which make up its functioning are beneficial to all."

This argument is as though a remainderman should argue that he was entitled to have the court put the life-tenant to death because of the unconstitutionality of a statute which made a remainder interest inalienable so long as the life-tenant lived.

The Municipal Finance Commission has no more power to enforce or relax the stays than the supposed life-tenant would have to make the remainder interest alienable. The court below has accomplished nothing in forbidding the Municipal Finance Commission to function in any way inconsistent with the right of the plaintiff to enforce its execution. The court's position is much as though it had held the Gold Clause Abrogation Act unconstitutional and had therefore enjoined the director of the W. P. A. Federal Theatre Project from functioning in any way which might be inconsistent with the right of a plaintiff to enforce the gold clause in bonds held by him.

In all seriousness and with all respect, we do not know what the injunction means. Its words seem to be divorced from reality. We are not helped by the court's conclusion of law (R. 93) which reads as follows:

> "2. We hold that the members of the Municipal Finance Commission are proper, necessary and indispensable parties to the action because of the supervisory control which the act of the Legislature of the State of New Jersey gives them over the municipality in question; that as such members they are given authority to enforce the provisions of the act, and that such authority invests them with powers making it necessary that they should be party defendants for the enforcement of any decree that may be made in this action. This conclusion applies to all of the counts in the bill of complaint."

It is to be noted that the court refers to no specific provision of the statute where the members of the Municipal Finance Commission are given with respect to the stays "supervisory control" or "authority to enforce them" or "powers making it necessary that they should be party defendants for the enforcement of any decree that may be made in this action."

On the contrary, the court below, after reciting a specific prayer for an injunction against the enforcement and execution of the stays, granted it only to the extent of enjoining functioning in a manner inconsistent with the right of the plaintiff to enforce its execution. (Decree, Par. X, R. 99.)

Thus, the plaintiff failed to assert a substantial claim to a cause of action for an injunction against the Municipal Finance Commission based upon the unconstitutionality of the stay provisions, because it failed to assert a substantial claim that the members of the Municipal Finance Commission were the parties against whom the injunction should run.

The declaratory judgment as to the stays falls with the injunction as to the stays, since the injunction was the court's sole basis for existence. The application for

ratory judgment was at best incidental to the applica-
or an injunction and if the three-judge court was with-
risdiction to entertain the application for the injunc-
it had even less jurisdiction to entertain the applica-
or the declaratory judgment. (*Oklahoma Gas & Elec-
o. v. Oklahoma Packing Co.*, 292 U. S. 386, 390 (1934)).

**As to the jurisdiction of the three-judge court with respect
provisions for acceptance of bonds in payment of taxes.**

will doubtless be urged that the injunction against the
tance of bonds in payment of taxes was one object of
it, at least, which raised a substantial question as to
bility of the Municipal Finance Commission to an in-
on against the enforcement and execution of a state
e on the ground of its unconstitutionality. The claim
e that in so far as relief is sought against the accept-
f bonds in payment of taxes, the case is brought under
n 266 of the Judicial Code and that the one-judge
t court is ousted of jurisdiction.

is clear, however, that the joinder of the members of
unicipal Finance Commission as defendants in the
which seeks that relief was merely colorable for the
se of ousting the district court of jurisdiction, and
herefore the application for an injunction against the
ance of bonds in payment of taxes raised no substan-
estion requiring the assembly of the three-judge court.
is point was raised below by the same steps as are
d in the preceding subdivision A of this point.

vertheless, the court's final decree contained (R.
eclaration that the acceptance of bonds in settlement
s may materially interfere with the complainant in
orcement of its judgment and embodied an injunc-
ainst all defendants from making settlement for taxes
owing to the borough by any medium except in ac-
e with the laws of the State of New Jersey.

our position that the prayer for such an injunction
the Municipal Finance Commission and the case

made out in support thereof was so palpably a colorable device to bring the case before a three-judge court, that such a court ought not even to have been assembled.

The sole connection of the Municipal Finance Commission with the acceptance of bonds in payment of taxes is to be found in Section 212 of the Act Concerning Municipal Finances, which provides as follows:

> "212. The governing body of any municipality in which the Commission is functioning shall have power to compromise and adjust the whole or any part of any special assessments or taxes delinquent to the municipality * * *. No claims of the municipality for taxes or assessments, and interest thereon, in excess of $500, shall be compromised without the assent in writing of the Municipal Finance Commission."

It is true that a plaintiff is entitled to keep its case out of the one-judge district court and submit it to a three-judge court under the language of Section 266 if it makes out a case for an "injunction suspending or restraining the enforcement, operation or execution of any statute of a state by restraining the action of any officer of such state in the enforcement or execution of such statute * * * upon the ground of unconstitutionality of such statute".

The plaintiff alleged that it was being injured by the action of the defendant Tax Collector of the Borough of Runnemede in accepting bonds in payment of taxes pursuant to resolutions of the Council in the Borough to which the consent of the Municipal Finance Commission (necessary because the compromises involved more than $500) was accorded. An injunction was sought against the Tax Collector *and against the Municipal Finance Commission.*

If the injunction were sought against the tax collector alone, no case would be stated for a three-judge court because the tax collector is not a state officer. On the other hand, a substantial claim for an injunction against the

unicipal Finance Commission which would require the ssembly of a three-judge court would probably carry with incidental jurisdiction to include the local officers in the junction unless the question involving the state officers as colorable or fraudulent. (*Firemen's Insurance Co.* v. *ha*, 30 F. 2d 539 (D. C. S. D. N. Y. 1928), aff'd. 278 U. S. 0 (1929—mem.)). The joinder of the Municipal Finance mmission here was clearly colorable.

No state of facts can be supposed under which the plain- f would be entitled to an injunction against the Municipal nance Commission's consenting to the compromise where would not also be entitled to an injunction against the collector's consummating the compromise. We can- conceive of any reason for joining the Municipal nance Commission in the prayer for the injunction ex- t for the purpose of taking this case out of the jurisdic- n of the one-judge district court. That such was the rpose of the plaintiff becomes perfectly clear when we e the plaintiff's failure to seek an injunction against the rough Council, which is the body empowered by Section of the Act Concerning Municipal Finances to authorize compromises. Surely if there was any reason for ask- an injunction against the Municipal Finance Commis- , which can merely consent to compromises, there would nuch greater reason for seeking an injunction against body which arranges the compromises.

t is settled that a mere nominal joinder of state officials efendants in a case where the substantial relief sought injunction against local officials does not require the ening of a three-judge court (*Pleasant* v. *Missouri- sas-Texas Ry.*, 66 F. 2d 842 (C. C. A. 10, 1933) *cert.* ed 291 U. S. 659 (1934)).

matters involving diversity of citizenship, the joinder necessary parties is disregarded (*Rogers* v. *Penobscot g Company*, 154 Fed. 606 (C. C. A. 8, 1907); *Salem t Company* v. *Manufacturers' Finance Co.*, 264 U. S.

182, 190 (1924)). We submit that the same rule should apply here.

The plaintiff, in Count Three, which we are now considering, sought an injunction against local officers (the assessors and collector) and invoked a three-judge court in the face of the many decisions that the ordinary one-judge district court is the only court with jurisdiction where the party sought to be enjoined is a local officer. The plaintiff's theory probably was that since it sought an injunction against state officers (the members of the commission) it was entitled to be heard by the three-judge court and, once in a three-judge court, it was entitled to have that court hear an incidental application for an injunction against a local officer. In other words, the theory is that the state officers are indispensable parties and the local officers are merely proper parties.

But here it is the application for the injunction against the local officer which is the main controversy and the application for the injunction against the state officers would, except for its obvious sinister purpose, be a mere useless flourish.

If the plaintiff was right in believing bond compromises unconstitutional the natural way and the only way in which the plaintiff could protect itself against the receipt of bonds for the payment of taxes was to have the court prohibit such action by the local tax collector, who is the only one authorized to accept the payment of taxes, or perhaps prohibit action by the local governing body, which is the only body authorized, under Section 212 of the Act Concerning Municipal Finances, to make compromises. Such a prohibition against either one of these local agencies would effectually prevent bond compromises. Nevertheless, the plaintiff added a prayer for an injunction against the Municipal Finance Commission's exercising its authority to consent to compromises arranged by the Borough Council where the amount involved is over $500. That injunction the court granted.

The cases cited above illustrate the principle that where the jurisdiction of the federal court depends upon the status of the parties to the proceeding, the courts will consider in the determination of the question only the necessary parties. No better example of an unnecessary party could be found than the Municipal Finance Commission in this case. The cases cited above held that certain parties were so unnecessary that they need not be considered in determining whether there was diversity of citizenship. In those cases the unnecessary parties were joined in order that equity might give complete relief. Even in such a case the presence of the unnecessary party in the suit is of no account in determining whether there is diversity or identity of citizenship between the parties. (*Salem Trust Co.* v. *Manufacturers' Finance Co.*, 264 U. S. 182, *supra*).

In the case at bar, if relief can be obtained at all, complete relief can be obtained without the presence of the Municipal Finance Commission, by a mere prohibition of the receipt of bonds in payment of taxes by the tax collector. An injunction against the Commission's consenting to that practice would add nothing. The Commission is, therefore, a completely unnecessary party in this proceeding and its presence in the case as the object of a prayer for an injunction against its consenting to bond settlements should not have availed to oust the one-judge district court of jurisdiction.

As in the case of the injunction with respect to the stays, the three-judge court, being without jurisdiction, to entertain the only controversy which might serve as a basis for its existence, i. e., the prayer for an injunction against the acceptance by the Municipal Finance Commission of bonds in payment of taxes, was *a fortiori* without jurisdiction to entertain the prayer for an injunction against the local officers or the application for a declaratory judgment that the statute permitting such compromise is unconstitutional.

CONCLUSION

The decree below should be reversed and the cause remanded to the United States District Court for the District of New Jersey with instructions to proceed independently of Section 266 of the Judicial Code and to dismiss the complaint upon the merits.

Respectfully submitted,

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APPENDIX A.

STATEMENT OF TH ACTIVITIES OF THE MUNICIPAL FINANCE COMMISSION WITH RESPECT TO THE BOROUGH AND SCHOOL DISTRICT OF RUNNEMEDE, NEW JERSEY.

Some notation has already been made of the causes and conditions which led to default in Runnemede. Several of them, such as the fact that real estate expansion had run away with sound financial planning (R. 167), that the borough had been improvidently formed to begin with, and that no local industries existed to provide jobs and salaries (R. 177), obviously were uncorrectible. Others, such as the failure to hold tax sales or foreclose on liens (R. 164, 173), inexperienced local fiscal management, interfund borrowings (R. 168-69), and the like, were more easily correctible. The essentially political nature of the financial theories of a town are nowhere more adequately demonstrated than in municipalities which have defaulted. Runnemede is no exception to the rule.

The Municipal Finance Commission entered the Borough of Runnemede when conditions were extremely bad. No tax sales had been held (R. 164-65); there was a disastrous amount of tax liens outstanding unforeclosed and unredeemed (R. 175); the local schools were gradually losing funds (R. 169); and the failure of the borough to discharge taxes owed to state and county contributed to the difficulties into which the superior governments were entering. With a cooperative mayor and council, this situation was not hopeless (R. 168, 166),—indeed, the introduction into the borough of the commission's experienced financial management and an auditor had immediate beneficial results (R. 320). Plans were made for a tax sale (see *infra*), and collections improved enormously (R. 320). In the fall of 1934, however, a new administration controlled the Council (R.

166). After that the Commission lacked the former de... of local cooperation and obstacles were placed in its pa... (*Ibid.*, and see *infra*).

The plaintiff's attempt at full discharge of this creditor's bond judgment by a lump sum mandamus would, if successful, have either raised the tax rate to an uncollectible point or ended all borough activities by drying up the source of sums allocated for vital current running expenses. These situations have been met by the Commission.

The first problem with which the Commission had to deal was the necessity of foreclosing on or perfecting tax liens and thus either forcing payments or acquiring sound title. In this the municipality had been extremely lax (R. 175, 323). The Commission took cognizance of that fact from the moment of its entrance (*Ibid.*) and substantial progress was soon reported (R. 320). Blanket foreclosure of course were inadvisable by reason of the expense necessitated when property owners hold the municipality to the letter of the strict New Jersey statute (R. 205, 320, 167). On October 19, 1934, some 24 acres (139 lots) were deeded over for taxes by their owners, without the expense of foreclosure (R. 312). Pressure towards collection of delinquent taxes was constant (R. 256) and the Commission followed and directed the Collector closely. Progress reports were demanded as a part of the weekly check-up (R. 234, 2... 320). Likewise, land receiverships for taxes were made use of under the Stout Act (R. 234). Tax title liens, subject to foreclosure, were regularly, and for the first time, turned over to the Borough Attorney (R. 208). Fortunately, in the matter of expense, 900 properties were deeded over for a price of only $450 (R. 167).

Foreclosure on liens, in time of an acute realty depression, is extremely likely to place in the hands of the municipality large quantities of dead property. While legal fees may be saved by the process of deeding over by the few property owners willing to do so, the question of dis...

posal remains a vexing one. Runnemede, for example, had taken over a theatre in fee simple (R. 173), and there were some 900 lots acquired by deeds (R. 167). The natural tendency was to dispose of such property as soon as possible. By its careful scrutiny of suggested leases and sales (R. 315, 305, 304, 256, 253, 208, 206), the Commission has staved off helter-skelter disposition urged by various would-be purchasers (R. 304). Recent developments indicate that a fairly good sale of the theatre is at hand (R. 203-204). Such conservation of assets is to the benefit of creditors and municipality alike. The whole attitude has been to bring about a valid sale at as high a price as possible considering the gradual improvement in the general financial and realty picture.

Again, the failure of the borough to hold a tax sale since 1930 (R. 164, 166) was not sound financial practice. The recent appearance of the collector before the County Board and the resultant pending sale are the successful culmination of some two years of endeavors on the part of the Commission (R. 204). At its third meeting on Runnemede, it directed that a "complete tax sale" be held after July 1, 1934 (R. 323). This followed an intensive investigation of the causes of the borough's troubles (R. 326-27, 323-24). Taxpayers at once protested strenuously (R. 321), and town officials urged that a sale might well abide the event of stronger efforts towards normal collection (R. 321). As a result, the Commission postponed the sale until September 1, 1934, with the understanding that only concrete proof at that time of substantial progress in clearing up overdue taxes could avert such a step being taken (*Ibid.*) The salability of much of the property was factually doubtful (R. 167). On September 7, 1934, the Commission decided that the collection in the previous two months of $7,905.38 of the $51,703.92 delinquent taxes lent considerable strength to a feeling that extraordinary measures would not be needed (R. 320). On September 20th, the Borough Council by

resolution directed a tax sale (R. 164-165, 315, 166), pro
were struck off of the advertisements (R. 166), collecti
improved at once (*Ibid.*), and when a new Council w
elected the matter never was carried through. The ne
administration even before its entrance hotly resisted
measures (*Ibid.*). Collections fell off again and on Apri
12, 1935, the Commission directed that a sale be held af
July 1st (R. 272-73). This had not been held by Novembe
1 (R. 234), and the Commission was forced to make th
direction again. Since only a taxpayer could mandamu
such a sale (R. 165), the Commission confined itself to pu
ting pressure upon the local officials (R. 214, 211-12). O
September 11, 1936 (R. 206), the Commission cited the Ta
Collector to appear before it. On September 18, 1936, i
took cognizance of the final semi-acquiescence of th
Council (R. 205-6).

The County Tax Board finally directed the Borough
Collector to hold the sale, advertisements appeared and th
sale was to be held *en bloc* on November 10, 1936 (R. 204).

The history of this long conflict is merely one exam
of the necessity of local intervention of the Commissio
for the benefit of bondholders. In other municipalities
save Avalon, where the majority of the property in arrear
is so unsalable as to raise serious doubts of the benefit o
such action, tax sales have either been held voluntarily an
legally or have been directed by the Commission, with th
municipalties acceding (*cp:* R. 166).

The work of clearing up past taxes, however, was no
confined to such major activities as these. There are a hos
of smaller problems, all of which the Commission has be
supervising carefully. They include such widely differen
tiated matters as a continuous check on revision of individu
assessments (R. 206, 207, 213-14); investigation of the ex
penses of town officials (R. 209); allowing and counselling
installment payment of taxes (R. 212, 210); checking th

fides of relief expenditures (R. 210); adjusting insur- costs (*Id.*); establishment of a new current expense (R. 211); obtaining W. P. A. loans (R. 242); bank ac- t adjustments (R. 316-17); the wisdom of issuing tax ıne notes (R. 282, 315); individual tax adjustments 315, 321, 285, 272, 256-57); and refusal of an often- ested blanket cancellation of interest (R. 210, 209, 208). y its acceptance of defaulted bonds for taxes in arrears, orough brought in $19,440.65 in cash, by transactions to or pending at the resolution of October 11, 1935, ı abandoned this practice save as to municipalities e all creditors agreed (Ex. E, R. 60 *et seq.*). No school s were so accepted (R. 171). In the vast number of the bills compromised were those of a taxpayer's e-lot property (119 parties compromised thus). The ırrears so discharged in Runnemede were extremely tful as to collectibility without such aid (R. 171). No t was given for interest coupons unpaid (R. 171). The ayer was forced to turn in cash for all interest and nt taxes (R. 171). Substantial reserves against future llectible taxes were set up for the first time (R. 172-73). ı bond settlements were stopped, collections went down 72). Those taxpayers who were allowed to settle in with bonds have been paying their taxes regularly such action (R. 171).

pincident with such work is the handling of the munici- udget so as to force inclusion of debt service items and down inadvisable expenditures. In this matter the ission has supervised the budget formation in Runne- year by year. The commission first considered Runne- 's budget early in 1935 (R. 298). At that time the ission and the borough officers conferred together a budget proposed by the borough (*Ibid.*). One of ost important corrections made in the budget tenta- put forward was the striking-out from the assets n of an appropriation of surplus revenue, thus avoid-

ing a deficit at the end of the year 1935, and substituting cash resources for a possible book entry (*Ibid.*). When the borough protested, the commission adhered to its view and certified the budget to the state auditor (R. 283), and the county board of taxation (R. 282, 285-86). The official budget for the year, then, was the one carefully worked out by the commission (*Ibid.*). Full debt service, with interest on the defaulted obligations, has been included in each budget (R. 164).

An even hotter fight came the following year. Runnemede failed to file preliminary budget information with the commission; it was finally secured (R. 233). Some difficulty was experienced in getting borough officials to the budget hearing (R. 233, 232-33); but on January 22, 1936, the entire budget was gone over in detail and current expenses pared down (R. 231-32). Further discussion took place (R. 223-24). A sizable item was included for foreclosures, and while deferred charges were reduced (*Ibid.*), the borough was not allowed to cut them any lower than a reasonable figure (R. 215). The appropriation for tax foreclosures being omitted by the borough council, which alone has power to make such appropriations, the commission acceded on that point alone. The borough then adopted a budget which differed; the commission transmitted its figures to the State Auditor for certification to the County Board, and these became official for the year (R. 214, 218). The borough never took steps to adopt this budget, but it stands by force of law as to imposition of debt service items and as to limitations on other appropriations.

The school budget was supervised with much less trouble due to the cooperative efforts of the Board of Education (R. 168). At the same time, the commission has not hesitated to revise it (R. 225-26) for economy and to insert full debt service, after taking jurisdiction in 1935 (R. 254-58). Likewise the audit has been checked (R. 234).

Once a budget has been set out, there remains the task of securing adherence to it. In this, too, the commission

been active, forcing emergency appropriations to be nded in the next budget (R. 207-208).

The work of planning for the future has also included other major activities,—the drafting and study of a unding plan (R. 316, 212) and the compilation and ease of material on the financial status of the borough 209). There is no evidence that the present plain- has advanced such a plan or aided in the one suggested 166).

Finally, the borough services must be kept running. commission has kept current expenses on a level of nomy (R. 213) while seeing to it that public utility vice, health service, and the like were not impaired 212, 211, 316, 320, 321, 322). Repairs on property in s for taxes were urged, to prevent abandonment and from the tax roll (R. 298).

A narration of the Commission's activities in Runne- le is not enough of and by itself. To the implications the complaint defendants answer generally that the stantial results of the functioning of the Municipal ance Commission in the borough and school district Runnemede have been beneficial to creditors, town and e alike. Certain evidence introduced by the stipulation rly demonstrates that fact.

It may be said that there are three cogent problems in management of any defaulting municipality: to keep necessary activities of the borough, such as the pro- ive services and the education system, in adequate king order; to pay creditors, or provide reserve sums ch can be allocated to them by some judicial process; to work out a permanent plan, by which an over- y or ill-organized funded debt can be made more ageable and safeguards can be imposed against fu- possible default. There is nothing savoring of com- sense in the granting of a lump sum mandamus which

can do nothing but force another default in the next fiscal year.

For purposes of comparison, Runnemede's financial situation at present may be placed against that of [illegible]. Likewise, the percentage statistics for Runnemede and the other eleven municipalities where the Commission functions may be placed against those of five other defaulting municipalities, picked somewhat at random, as offering a fair cross-section of the state: Lakewood, Moonachie, Neptune City, West New York and Woodbridge. The statistical materials from which these results are taken will be found at R. 329-346.

First, in the all-important matter of the collection of taxes:

TABLE I.

TAX COLLECTIONS—CURRENT YEAR—%

	1930	1931	1932	1933	1934	1935	1936 (10 mo.)
Asbury Park	55	52	46	45	54	51	20
Avon	47	44	40	35	39	39	15
Bayonne	25	21	15	12	14	15	6
Belmar	40	37	31	28	35	47	25
Bradley Beach	50	42	36	32	37	39	16
Deal	67	63	54	47	53	51	26
Interlaken	59	54	44	40	43	45	17
Manasquan	73	71	62	57	70	72	37
Mt. Ephraim	50	46	38	27	36	39	16
North Bergen	56	52	43	31	45	54	25
Pennsgrove	**46**	**37**	**34**	**32**	**42**	**42**	**21**
South Hackensack	39	39	29	27	34	38	14
Average (12)	**51**	**46**	**39**	**36**	**42**	**43**	**20**
Tinton Falls	50	50	44	34	40	38	26
Wanaque	52	52	40	33	37	36	18
Wenonah	56	48	38	31	43	46	14
West New York	65	64	49	42	48	44	23
Woodbridge	61	55	50	36	51	52	19
Average (8)	**57**	**54**	**45**	**37**	**45**	**43**	**19**

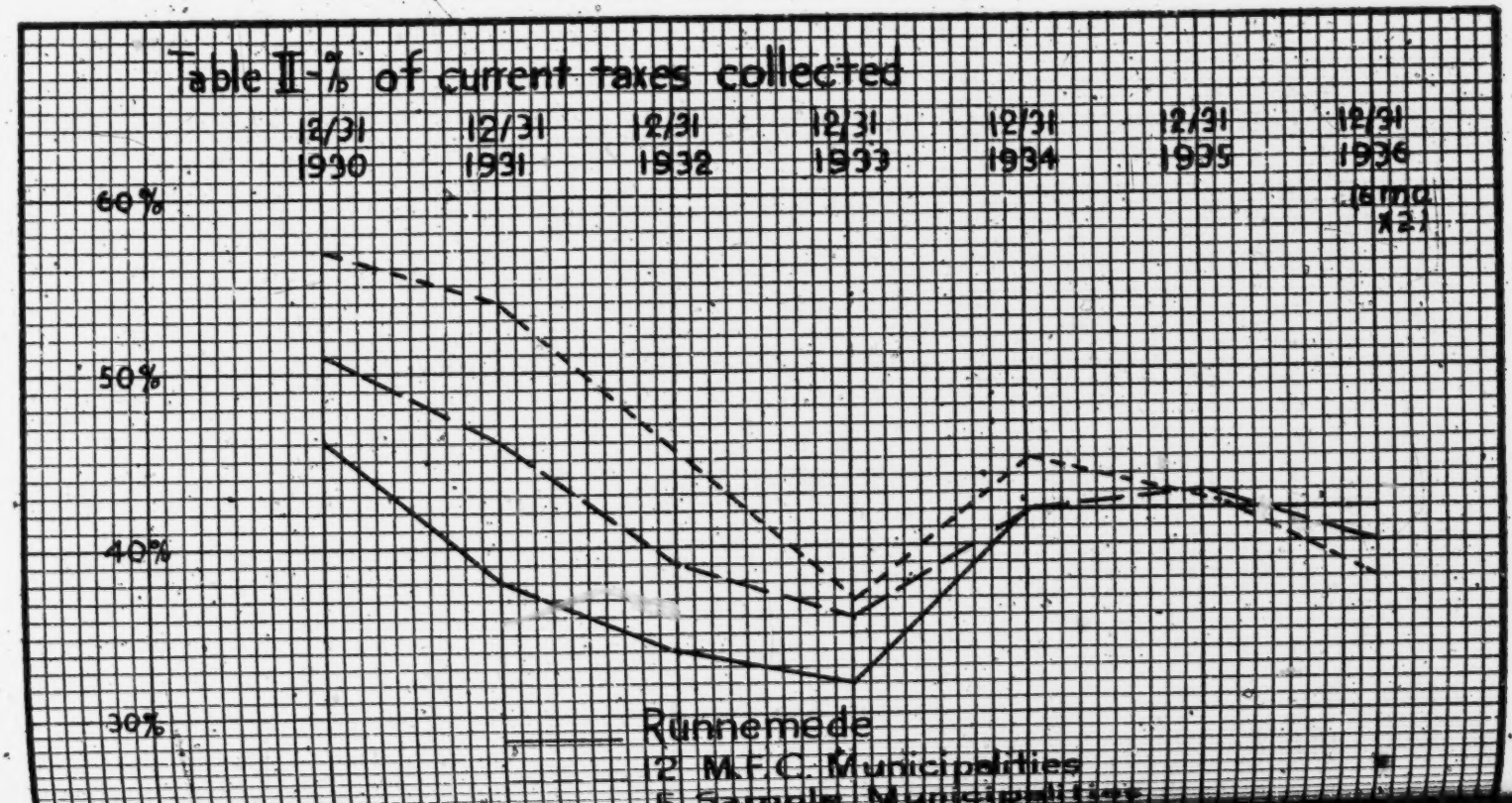
Table II - % of current taxes collected
12/31 1930
12/31 1931
12/31 1932
12/31 1933
12/31 1934
12/31 1935
12/31 1936
60%
50%
40%
30%
Runnemede
12 M.F.C. Municipalities

TABLES I AND II.

These tables show the percentage of current taxes collected each year. It shows that the situation in Runnemede and the other towns where the Commission has entered was worse, up until 1933 and 1934, the years in which the Commission started functioning, than in the five other towns. Since then, Runnemede has improved sharply and held its gain, as have the other eleven Commission municipalities. The five sample towns improved in 1934, but have fallen off since and apparently will be below the Commission municipalities and Runnemede at the end of the current year. The pending tax sale in Runnemede makes this still more likely.

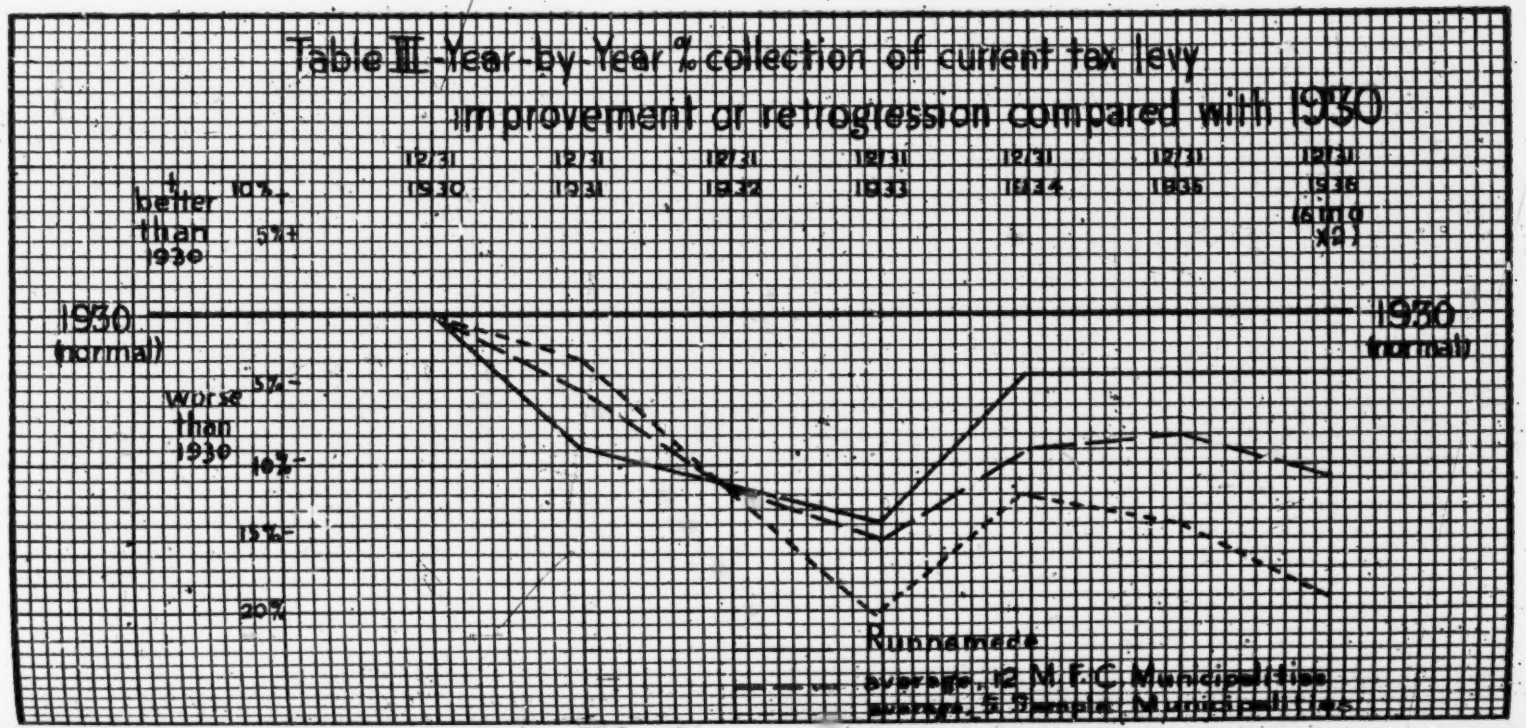
Table III - Year-by-Year % collection of current tax levy
improvement or retrogression compared with 1930
12/31 1930
12/31 1931
12/31 1932
12/31 1933
12/31 1934
12/31 1935
12/31 1936
10% + better than 1930
5% +
1930 (normal)
5% -
worse than 1930
10% -
15% -
20% -
Runnamede
average 12 M.E.C Municipalities
average 5 Bergen Municipalities

TABLE III.

This graph illustrates the meaning of the above figures on percentage collection of the current year's taxes. Runnemede's collections as did those of the other Municipal Finance Commission municipalities and the five samples dropped sharply below the 1930 collections until the year 1934. In that year, the Commission entered Runnemede and collections improved more rapidly than in the five compared municipalities. The twelve towns averaged did only 2% worse than the five towns. Since the end of 1934, Runnemede has held on an even level. The twelve towns held level for one year, and then dropped slightly. The five towns dropped steadily in both 1935 and 1936. Since the towns into which the Commission has entered must have been in extremely bad shape to necessitate such action, progress in tax collections there should certainly be no better than that in other defaulting municipalities in the state. Yet it is.

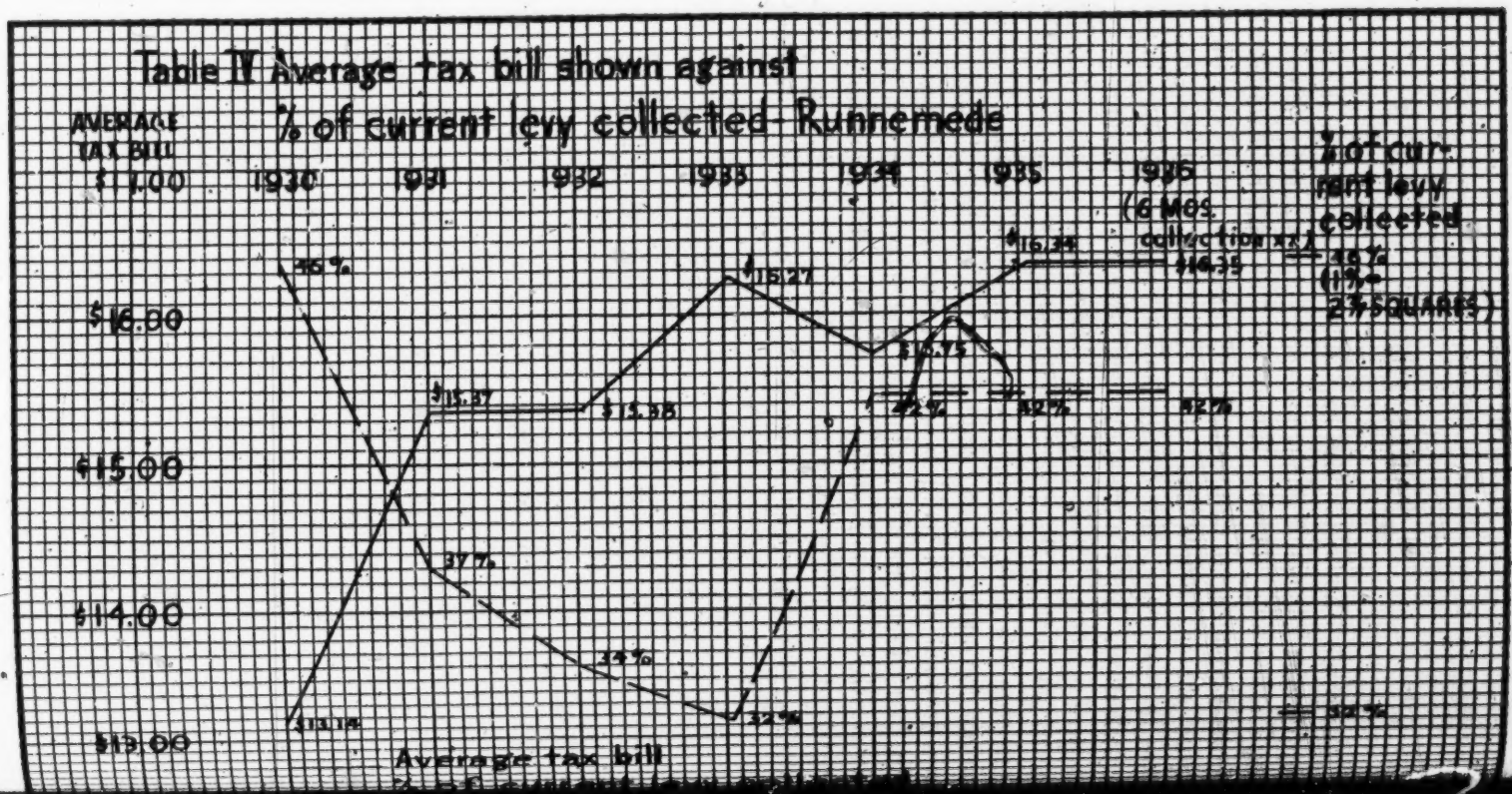
Table IV Average tax bill shown against % of current levy collected Runnemede
AVERAGE TAX BILL
$17.00
$16.00
$15.00
$14.00
$13.00
1930
1931
1932
1933
1934
1935
1936 (6 mos. collection x 2)
% of cur. rent levy collected
36%
37%
33%
$13.18
$15.37
$15.55
$15.27
$16.25
$16.35
$16.13
42%
32%
32%
Average tax bill

TABLE IV.

This table shows that despite alterations in the tax rate nd assessed valuation, the Commission budgets have neces- itated a somewhat higher average tax bill in 1935 and 1936. et this has not checked tax collections, for the total cur- ent collections first improved, when the average tax bill ropped, and since then have held steady as it increased. hile the Commission had nothing to do with the size of he tax bills until 1935, it may claim credit for the improve- ent of 1934 over 1933 in collections. In other words, col- ctions have been kept at a fair level. Since the annual tax ate and the total assessment valuation vary proportion- tely in relation to each other, the average tax bill is the nly true determinant of the real tax load. The Commis- ion's endeavors to adjust it to the point of maximum col- ctibility have been successful.

TABLE V.

Cash in current funds.

Asbury Park	Current 1936	Aug. 31, '36	145,914.69
	Prior years		589,697.02
	Trust		42,867.24
	Capital		10,207.50
	Water		101,756.86
	Beach		216,625.93
	Rent deposit		41,293.73
Avalon	Current	July 26, '36	7,984.75
	Trust		6,376.46
	Capital		1,209.62
	Sinking fund		1,810.98
	Water		1,237.83
Brigantine	Current	Aug. 31, '36	9,814.95
	Trust		2,450.67
	Capital		2,183.11
Chester	Current	Dec. 31, '35	11,863.73
	Trust		22,796.52
	Capital		667.76
	Sewer		28,742.97
	Water		18,043.41
Delaware	Current	Dec. 31, '35	6,530.64
	Trust		60,935.43
	Capital		1,323.60
Fort Lee	Trust	Aug. 31, '36	3,422.22
	Bond impr. service		126,106.04
	Sinking fund		12,217.86
	1936 debt service		52,336.93
	1936 school debt service		12,000.00
Lavallette	Current	Dec. 31, '35	886.37
	Trust		5,696.39
	Capital		162.66
Manville	Current	Dec. 31, '35	17,850.00
	Trust		1,268.45
	Capital		1,012.12
	Water op.		2,713.24
	Water cap.		524.97
Mt. Ephraim	Current	Dec. 31, '35	5,063.79
	Trust		17,391.22
	Capital		1,989.69
	Water op.		1,352.90
N. Bergen	Current	July 31, '36	419,475.51
	Trust		191,184.85
	Capital		28,221.01
	Sinking fund: reserve.		1,366,322.77
Runnemede	Current	Dec. 31, '35	5,661.24
	Capital		10,545.88
S. Hackensack	Current	Dec. 31, '35	752.02
	Trust		4,758.16
	Water assess.		8,577.77

The final important query from the creditor's viewpoint is—"What has been done towards payment?" In some municipalities a refunding will be necessary. Such refundings have been had in Manville and in Lavallette, where creditors were cooperative. (*United States ex rel. Norfolk & Western Ry. Co.* v. *Township of Chester*, U. S. D. C. D. N. J., March 12, 1936; (R. 188-89)). The Commission has long recognized that such measures may be necessary in Runnemede (R. 316). But in all of the municipalities where the Commission operates substantial cash balances have been built up. In the absence of creditors being willing to consider refunding, it is not for the Commission itself to distribute such moneys. Table V demonstrates their extent.

The Municipal Finance Commission Act provides for application by creditors, to the courts of New Jersey, seeking distribution of such funds. (§ 354; P. L. N. J. 1935, Ch. 191, as amended by Ch. 314, P. L. N. J. 1935, Ch. 258, § 17 (c), as amended by P. L. N. J. 1936, Ch. 251.) The Municipal Finance Commission has never resisted such a petition. The funds are there,—a proceeding is provided for their distribution. If in any municipality the creditors feel that the funds should be distributed now instead of as part of a general refinancing they are at liberty to urge that position in the way the law provides.

Study of the statistics submitted also demonstrates that in the twelve Commission municipalities, amounts due the local schools, which in Runnemede had been in severe financial straits (R. 169), have been largely cleared up. No longer is there any threat of their closing. It is also true that sums due the State and County for taxes have been cut down, thus aiding to ameliorate a generally dismal financial situation in New Jersey. Finally, and most important, in the majority of cases cash tax collection improved.

It is submitted that where, under the guidance of the Municipal Finance Commission, towns in default have succeeded in collecting more of their taxes than they did before its entrance; where the average tax bill has been so ad-

justed as to reach a point of steady collectibility; where large quantities of dead property on the hands of the municipality have been disposed of after deliberate consideration of the advisability of sales; where tax sales, long unheld, have been carried out or are pending; where refunding plans have been drawn up, and, when creditors were willing to help, have actually been carried through; where the local schools have been kept open; where illegal diversion of trust funds has been stopped; where the budget has been supervised and controlled, unauthorized expenditures forbidden, and current expenses ridden of waste; where reserves have been set up against future uncollectible taxes; where an experienced financial management has replaced local officials having only rudimentary knowledge of financial affairs; and where large sums are now available for equitable distribution to creditors, the Municipal Finance Commission of the State of New Jersey has not been "lax and dilatory" in the tasks imposed upon it.

APPENDIX B:

PROVISIONS OF THE NEW JERSEY EXECUTION ACT WITH RESPECT TO ENFORCEMENT OF EXECUTIONS AGAINST THE TAXING POWER.

Section 34 of the Execution Act (2 Comp. Stats. p. 2255).

"34. Execution against municipal corporation; service on collector; levy of tax.—Sec. 1. That when any execution shall be issued against any town, township, borough or other municipal corporation of this state, by any court authorized to issue the same, upon any judgment against such town, township, borough or municipal corporation, whether upon a judgment recovered before the passage of this act or subsequent thereto, and there shall be no property belonging to such town, township, borough or other municipal corporation sufficient to satisfy the same whereon to levy, then the officer authorized to execute such process shall serve a copy of the same, not only on the collector of such town, township, borough or other municipal corporation, as is now required by law, but also upon the assessor thereof, who is by law required to assess the taxes in and for such town, township, borough or municipal corporation; and upon receipt of such copy of execution it shall be the duty of such assessor to assess and levy, in addition to the regular taxes, the amount due upon the said execution, with interest to the time when the same shall be paid to the officer serving such process, upon all the property within such town, township, borough, or other municipal corporation; and this tax shall be assessed and collected at the same time and in the same manner and under the same conditions, restrictions and regulations as taxes for other purposes are required to be assessed and collected in such town, township, borough or municipal corporation, and when collected shall be paid over to the officer serving the said process."

Section 35 of the Executions Act (2 Comp. Stats. p. 2256):

"35. Execution against school district; service on township assessors and collectors; levy of tax.—Sec. 1. That when any execution shall be issued

against any school district of this state, or against the trustees of any such school district as a body corporate representing such school district, by any court authorized to issue the same, whether upon a judgment recovered before or subsequent to the passing of this act, and there shall be no property belonging to said school district or body corporate sufficient to satisfy the same liable to be levied on, then the officer authorized to execute such process shall serve a copy of the same upon the assessor or assessors of the township or townships in which said school district is situate, and also upon the collector or collectors of such township or townships; and upon receipt of such copy or copies, it shall be the duty of such assessor or assessors, at the time of the next regular assessment of school taxes in such school district, to assess and levy in addition to said regular school taxes, the amount due upon said execution, with interest to the time when the same shall be paid to the officer serving such process, upon the inhabitants of said school district and their estates and upon the taxable property therein; and this tax shall be assessed and collected at the same time and in the same manner and under the same conditions, restrictions and regulations upon the assessor or assessors, collector or collectors as other taxes for school purposes are required to be assessed and collected in such school district; and the amount of this tax when collected shall be a separate fund, and shall be paid over by the collector of the township in which such school district shall be situate, or if such school district be situate in two or more townships then by the collector of that township in which the fraction of the school district containing the school-house is situate, the officer serving the process."

Section 237 of the School Law (4 Comp. Stats. p. 4804):

"237. Execution against boards of education: service; tax to pay.—Whenever an execution shall be issued against the board of education of a school district or of a union-graded school by any court authorized to issue the same, upon a judgment recovered

either before or subsequent to the passage of this act, and there shall be found no property belonging to said school district or union-graded school sufficient to satisfy the same liable to be levied on, then the officer authorized to execute such process shall serve a certified copy of said execution upon the assessor or assessors of the taxing district or districts in which said school district or union-graded school shall be situate, and also upon the collector or collectors of such taxing district or districts. Upon receipt of such copy or copies such assessor or assessors shall, at the time of the next regular assessment of school taxes, assess upon the inhabitants of said school district and their estates, and upon the taxable property therein, in addition to the regular school taxes, the amount due upon said execution, with interest thereon to the time when the same shall be paid to the officer serving such process and the collector or collectors shall levy and collect the same, and said amount, when collected, shall be a separate fund, and shall be paid over by said collector to the officer who shall have served said process."

Throughout this litigation these two laws are collectively rred to as the Executions Act. It is our contention that June 1, 1930, when the bonds held by the plaintiff were ed, the provisions of the Tax Law of 1918 had been sub- ted for the above quoted provisions of the Executions so far as school districts were concerned. The provision he Tax Law which we contend has been substituted is of Section 505 of P. L. 1918, p. 847 at p. 865, reading ollows:

Tax Act of 1918 (Laws of 1918, Ch. 236, § 505):

"505. • • • When any execution shall be issued upon judgment against any taxing district, and there shall be found no property sufficient to satisfy the same by levy, the officer shall serve a copy of his execution upon the county board of taxation having jurisdiction over said taxing district, and it shall be the duty of the county board of taxation to add the

amount due upon said execution, with interest to the first day of June following, to the amounts certified to it to be raised by taxation in said taxing district, and the amount of said execution and interest shall thereupon also be raised by taxation in said taxing district and paid by the collector thereof on or before the fifth day of June following: *provided*, however, that if the copy of said execution shall not be served upon the county board of taxation before said board shall have determined and fixed the rate for said taxing district for the year, then the amount shall be included by said board in the amount to be raised by taxation in the next following year, and the interest shall be calculated to the first day of June of such year, unless the amount of such execution and interest shall have been included in the taxing ordinance or resolution with the other amounts to be raised by taxation in said taxing district, or unless the execution shall have been satisfied otherwise."

APPENDIX C

CTS RELATING TO THE MUNICIPAL FINANCE COMMISSION

ter 340, Laws of New Jersey of 1931, as amended and emented to June 26, 1936; Chapter 382, Laws of 1933; Chapters 154, 193, and 258, Laws of 1935.

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An Act Concerning Municipal Finances

Chapter 340, Laws of 1931

Approved April 28, 1931, as amended to June 26, 1936

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

ARTICLE I.

CONSTITUTION OF THE COMMISSION.

101. Whenever it shall be made to appear to a justice of the Supreme Court from any petition filed with him by or on behalf of the holder of any notes or bonds of any municipal corporation of this State, verified by the petitioner, or his or its duly authorized agent, that such municipality has defaulted for over sixty days in the payment of the principal or interest of any of its outstanding notes or bonds held by such petitioner, it shall be lawful for said justice of the Supreme Court to make a summary investigation into the facts disclosed in said petition, and for that purpose he shall have the power to subpoena witnesses and call before him any officers of said municipality. If it shall be established to the satisfaction of said justice that said municipality is so in default, he may make an order to that effect and file the same, together with the said petition, in the office of the clerk of the Supreme Court. (As amended by P. L. 1933, Ch. 9.)

102. Upon the filing of said order, together with said petition, the municipal finance commission, which is hereby created, shall have and exercise with respect to such municipality the powers and duties prescribed by this

act. The Attorney-General, the State Tax Commissioner, and the Commissioner of Municipal Accounts shall constitute such municipal finance commission hereinafter sometimes designated as the "commission." Each member of said commission may designate an assistant in his department to serve in his stead during his absence or inability to act. (As amended by P. L. 1932, Ch. 236, and P. L. 1933, Ch. 330.)

103. Any municipality may file with a justice of the Supreme Court a certified copy of a resolution adopted by the governing body of the municipality, reciting in general terms that due to unusual conditions the municipality is not in a position to meet its obligations when due, in spite of the endeavors of its officers, and petitioning that the municipal finance commission shall function in said municipality. Upon the filing of such petition and upon such notice to the municipal finance commission as said justice may direct, it shall be lawful for said justice of the Supreme Court to make a summary investigation into the facts and for that purpose he shall have the power to subpoena witnesses and call before him any officers of said municipality. If it shall be established to the satisfaction of said justice that said municipality is so unable to meet its obligations, he may make an order to that effect and file the same, together with the said petition, in the office of the clerk of the Supreme Court. Upon the filing of such order, the commission authorized in the preceding section of this act shall function in the said municipality with all the powers and duties conferred by this act. (As amended by P. L. 1933, Ch. 330.)

104. The commission shall have power to make all needful rules for its government and other proceedings not inconsistent with this act, and shall have and adopt a common seal. (Added by P. L. 1932, Ch. 236.)

ARTICLE II.

Powers.

201. The commission shall have power from time to time to prepare and certify to the governing body of such municipality resolutions providing for the funding or refunding of notes or bonds, or other indebtedness of the municipality, and the interest thereon, which the commission shall have found after public hearing to be outstanding and unpaid and to be due or to become due. (As amended by P. L. 1932, Ch. 236, and P. L. 1935, Ch. 192.)

202. Any proposed resolution providing for the issuance of notes or bonds, if such notes or bonds are payable more than one year from the date of issue, shall be certified as aforesaid only after a public hearing by the commission; but no resolution or amendment thereto determining or altering the form of notes or bonds or providing for their sale, execution or delivery shall require any public hearing before such certification.

203. Such resolution shall, on direction of the commission, be adopted by the proper officials of such municipality in the form certified by the commission.

204. Such resolutions and any notes or bonds issued thereunder shall not be subject to the limitations or other provisions of any other act.

205. Excepting resolutions determining or altering the form of notes or bonds or providing for their sale, execution or delivery, and resolutions amendatory thereof or supplemental thereto, such resolutions shall be published in a newspaper circulating in the munici-

pality and shall take effect immediately upon such publication. Resolutions not required to be published shall take effect immediately upon adoption by the proper officials of such municipality. Thirty days after taking effect all resolutions shall be conclusively presumed to have been duly and regularly adopted by such municipality, and to comply with the provisions of this and every other law, and the validity of any such resolution shall not thereafter be questioned by either a party-plaintiff, or a party-defendant, except in a suit, action, or proceeding commenced prior to the expiration of such thirty days. (As amended by P. L. 1932, Ch. 236, and P. L. 1935, Ch. 225.)

206. Subject only to the limitations of this act, such resolution or resolutions supplemental thereto shall determine the terms and the form of notes or bonds to be issued thereunder, and provide for their sale or exchange and their execution and delivery, by such officers of the municipality as shall be therein designated, and it shall be mandatory upon such officers to sell or exchange and execute and deliver such notes or bonds as so determined and provided. (As amended by P. L. 1932, Ch. 236.)

207. All such notes or bonds shall be sold at not less than par at public sale after notice setting forth the terms and conditions of sale, published in such newspaper circulating in the municipality, and in such financial newspaper, as shall be designated by resolution, except in the following cases:

(a) If no bids are received at such public sale, or if all bids are rejected, any notes or bonds or part thereof may with the written assent of the commission be sold without further notice at private sale at any time within six months.

(b) With the approval in writing of the commission, any notes or bonds or part thereof may be exchanged for any notes or bonds, including interest thereon, of the municipality issued under this or any other act. The rate of interest borne by any such notes or bonds may be higher or lower than the rate of interest borne by the notes or bonds surrendered.

(c) With the approval in writing of the commission, any notes or bonds may be issued directly to any creditor of the municipality in absolute and unconditional payment of the indebtedness and interest thereon of such municipality to such creditor, *provided* that notes or bonds shall not be so issued unless and until the amount due such creditor has been determined by the governing body of the municipality and by the commission, nor unless and until the municipality receives from such creditor a release running to the municipality and if such creditor is a party plaintiff in any suit, action or proceeding pending against the municipality relative to such indebtedness, a stipulation of dismissal of such suit, action or proceeding. Such release and such stipulation shall be approved as to form by the counsel to the municipality and by counsel to the commission.

(d) Any notes or bonds, or any part thereof, may be sold without any previous public offering to, and be purchased by, the sinking fund commission or the insurance or pension fund commissioners of the municipality offering the bonds, or be sold to any board, commission or officers of the State, authorized by law to purchase such notes or bonds.

(e) Any notes or bonds payable not more than seven years from their date may be sold at private sale with the written assent of the commission. (As amended by P. L. 1932, Ch. 236.)

208. Unless a suit, action or proceeding questioning the validity of notes or bonds, purporting to be issued by virtue of any such resolution, be commenced prior to the expiration of the thirty-day period hereinabove provided, any such notes or bonds reciting that they are issued pursuant to this act shall, after their issuance and delivery, if no suit relating thereto is then pending, be conclusively presumed to be fully authorized by all the laws of this State and to have been issued, sold, executed and delivered by the municipality in conformity therewith, and shall not be questioned by the municipality or any taxpayer thereof in any court, anything herein or in other statutes to the contrary notwithstanding.

209. In order to conserve the financial resources of the municipality, its governing body without the assent in writing of said commission shall pass no ordinances or resolutions authorizing the issuance of notes or bonds of any kind or character or creating any obligation or indebtedness of the municipality, except tax anticipation or tax revenue notes or bonds for the current year. Nor shall such governing body, without like consent, include in any annual budget or tax ordinance amounts for local expenditures in excess of the like amounts for the preceding annual budget, exclusive of appropriations for the purpose of raising the principal and interest on the public debt. After an appropriation has been approved by the commission, the actual expenditure thereunder shall be made by the municipal authorities; *provided, however,* that no claims whether under appropriations approved by the commission, or included in the annual

budget or tax ordinance, or otherwise, shall be passed for payment by the officers of such municipality until the auditor shall have certified that the same have been examined by him and found to be within appropriations theretofore duly made by the municipality, and that there is or will be available in an appropriate account, sufficient ready funds for such payment. (As amended by P. L. 1932, Ch. 236, and P. L. 1933, Ch. 330.)

209-a. Whenever any municipality in which the commission is functioning has been or shall be in default for twelve months in the payment of interest on any of its bonds or notes or other written evidence of indebtedness (except where the same is under litigation as to its validity, or where the validity thereof has been denied by formal notice given by the municipality, and no suit, action or proceeding to enforce the same has been commenced by the holder); or whenever any such municipality has been or shall be in default for six months in the payment of any part of its regular pay roll, or in the payment of any sums due from the annual tax levy to the State, county or school district, then in any event no subsequent budget or tax ordinance or appropriation for local school purposes shall include any amounts in excess of such limits as may be fixed by the commission, exclusive of appropriations for the purpose of raising the principal and interest on the public debt, and exclusive of appropriations to create a reserve fund under the provisions of section two hundred eleven of this act. (Added by P. L. 1933, Ch. 330.)

209-b. To the end that the principal of and interest on the notes or bonds issued hereunder may be further secured and thereby a more favorable sale or exchange effected, any resolution authorizing the issuance of notes or bonds hereunder may contain provisions which

shall be a part of the contract with the holders of such notes or bonds as to (a) the amount to be included in any budget or tax ordinance or to be appropriated by or raised by taxation in the municipality in each year for debt service and for reserve or sinking funds, which amount may be expressed in dollars, percentage of total assessed valuations or both, or otherwise; (b) the setting aside of reserve or sinking funds, and the amount, securing, regulation, investment, application and disposition thereof; (c) the pledging, depositing or trusteeing of moneys to be applied to the payment of the principal of and interest on the notes or bonds, and the securing of such deposits; (d) the pledging of taxes, special assessments and other revenues or moneys of the municipality, which are due or to become due, directly to the payment of the principal of and interest on the notes or bonds, or to reserve or sinking funds; (e) the use and application of unanticipated income or surplus revenue or both of the municipality; (f) limitations effective for not exceeding ten years from the effective date of such resolution or resolutions on the amount or nature or borrowing or incurring of indebtedness by the municipality; (g) the holding of lawful tax sales of property against which there may then or thereafter be outstanding delinquent taxes or assessments or other charges and the foreclosing of the right of redemption with respect to tax titles theretofore or thereafter purchased by the municipality; (h) the inclusion in any budget of appropriations as reserves for uncollected taxes, and the amount, computation and disposition thereof and of the proceeds of the tax levy therefor; (i) the performance by the municipality of all or any specified provisions of any law relating to the preparation, adoption, and administration of budgets and the levying of taxes in municipalities; (j) appointment of a fiscal agent by the municipality and the powers and duties

hereof; (k) the terms and conditions upon which any uch resolution or any contract entered into thereby may e amended, rescinded or repealed; (1) any other or urther course of conduct on the part of the municipality hich may tend to improve its credit standing. Any unicipality adopting a resolution containing any provi- ion authorized hereunder shall have and possess all of he powers necessary and appropriate for the perform- nce thereof. The provisions of any such resolution hall be enforceable by mandamus or other appropriate ction or proceeding at law or in equity instituted by he commission or by the holder of any note or bond on ehalf of all the holders of such notes or bonds, whether r not there shall have been any default in the payment f the principal of or interest on any such notes or onds. (Added by P. L. 1935, Ch. 225.)

209-c. Any resolution authorizing the issuance of notes or bonds hereunder may provide that any sums required pursuant to such resolution to be set aside by the municipality for reserve or sinking funds shall be paid to the sinking fund commission of such municipal- ity, and all moneys so paid to such commission shall be held and applied by it only as in such resolution pro- vided and shall not be commingled with any other moneys held by such commission. The provisions of an act entitled "An act concerning sinking funds and sink- ing fund commissions," approved March twenty-ninth, one thousand nine hundred and seventeen, as amended and supplemented, in so far as they relate to the crea- tion, setting aside or maintenance of sinking funds and the investment, application and disposition thereof, shall have no application with respect to notes or bonds issued under this act or any reserve or sinking funds provided therefor. (Added by P. L. 1935, Ch. 225.)

209-d. Any resolution authorizing the issuance of notes or bonds hereunder may provide that the notes, bonds or other obligations of the municipality then held by the sinking fund commission thereof shall be cancelled and that other property or funds in the custody of such commission shall be applied to the payment of other indebtedness of the municipality as in such resolution provided, and said commission shall cancel said notes, bonds or other obligations and apply such property or funds accordingly; *provided, however,* that nothing herein contained shall be deemed to permit, without the consent of such holder, the impairment of any rights of the holder of any note, bond or other obligation of the municipality for the security or payment of which any such notes, bonds, obligations, property or funds shall be held. (Added by P. L. 1935, Ch. 225.)

210. All notes or bonds issued under this act may be subject to such terms of redemption, with or without premium, and contain such provisions, conditions and limitations with respect to the acceleration of the obligation to pay the principal thereof upon such default in the payment of interest on or principal of any bonds or notes, or in respect to the provisions concerning debt service and sinking fund payments, as the resolution authorizing their issuance may provide. Any notes or bonds issued under this act in exchange for any instrument issued under this or any other act may be authorized by such resolution to contain a provision that, in case of default in payment of the principal of or interest on any such note or bond, the holder thereof shall not only have all his rights and remedies thereunder, but in addition shall be reinvested with such of the rights or remedies which he would have had were he then the owner and in possession of the instrument in ex-

change for which such note or bond shall have been issued as may be specified in such resolution. Such notes or bonds may contain such reference to any special covenants or provisions contained in the resolution authorizing their issuance and such other terms, conditions or provisions not inconsistent herewith deemed by the commission to give said notes or bonds a higher degree of marketability as the resolution or resolutions determining the form of the notes or bonds may provide. All notes or bonds issued under this act containing any one or more of such references, terms, provisions or conditions shall be deemed negotiable instruments, the provisions or limitations of any other law to the contrary notwithstanding; *provided, however,* that nothing in this section shall be construed to impair the negotiability of any other instruments negotiable under other laws of this State. (Added by P. L. 1932, Ch. 236, and amended by P. L. 1935, Ch. 225, and P. L. 1936, Ch. 50.)

211. Any municipality in which the commission is functioning shall have the power to levy taxes ad valorem upon all taxable property therein for the purpose of paying the principal of and/or interest on any notes, bonds or other obligations or indebtedness of such municipality issued under this or any other law and shall have the power to provide a reserve fund for the payment of said principal and interest, which fund shall be under the immediate jurisdiction of the sinking fund commissioners or of a financial officer, of the municipality, as the commission shall approve. The full faith and credit of any such municipality shall be deemed to be pledged for the punctual payment of the principal of and interest on all notes and bonds issued pursuant to this act. No money shall be withdrawn from said reserve fund or sinking fund for investment or otherwise without the approval of the commission. (Added by P. L. 1932, Ch. 236, and amended by P. L. 1933, Ch. 330.)

212. The governing body of any municipality in which the commission is functioning shall have power to compromise and adjust the whole or any part of any special assessments or taxes delinquent to the municipality; *provided, however,* that nothing in this section shall be construed to impair or affect in any way whatsoever the existing rights and remedies of any holder or holders of a certificate or certificates of tax sale, representing any tax title or titles to lands in such municipality sold on account of delinquent taxes and/or delinquent assessments. No claims of the municipality for taxes or assessments, and interest thereon, in excess of five hundred dollars, shall be compromised without the assent in writing of the Municipal Finance Commission. All moneys received by the municipality by compromise or adjustment of taxes or special assessments shall, if the commission so provide, be paid only to the account of the reserve fund referred to in section two hundred and eleven hereof. (Added by P. L. 1932, Ch. 236, and amended by P. L. 1933, Ch. 330.)

213. The governing body of any municipality in which the commission is or may be functioning may, upon the express consent in writing of the commission, sell, exchange or otherwise dispose of any certificate of tax sale or tax title standing in the name of the municipality, or sell, exchange, lease or otherwise dispose of any real estate or rights or interest therein owned by the municipality and determined by the governing body to be not needed for public use. Any such sale, exchange, lease or other disposition may be authorized by resolution of the governing body and, subject to the consent of the commission as aforesaid, may be at public or private sale, through a broker, agent or otherwise, for cash or upon credit, for such consideration, and subject to such conditions and commissions, as the govern-

ing body in its discretion may determine. All moneys received by the municipality from any such sale, exchange, lease or other disposition shall, if the commission so provide, be paid only to the account of the reserve fund referred to in section two hundred eleven hereof. (Added by P. L. 1936, Ch. 250.)

213.* (a) Any municipality in which the Municipal Finance Commission is functioning may, with the approval of the commission, accept its own bonds and the bonds of the board of education of a co-terminous school district, in payment of all or any part of the purchase price of tax title liens and assessment title liens held by said municipality or in payment of all or any part of the purchase price of real property acquired by such municipality through the foreclosure of such tax title liens and assessment title liens and may exchange such tax title liens and assessment title liens and such real property for such bonds at such times and for such prices as the governing body of such municipality shall determine, subject to the approval of the Municipal Finance Commission. Such municipalities and boards of education may issue refunding bonds in the manner now or hereafter provided in this or any other act for the purpose of refunding all or any part of the balance due to the holders of the bonds presented in payment of said tax title liens and assessment title liens or said real property, and such municipalities and boards of education may also issue non-transferable, non-interest-bearing tax payment certificates in such denominations as may be determined by such municipalities and such boards of education for the purpose of refunding all or any part of the balance due to the holders of the bonds presented in payment of said tax title liens and assessment title liens or said real property, which tax payment

* Duplication of section numbers appears in original.

certificates shall not be payable in cash but shall be acceptable at their face value in payment of future taxes levied by the State, county or municipality and school district for State, county, local municipal and school district purposes; *provided, however,* that said tax payment certificates shall recite on their face that they are non-transferable and non-interest-bearing and not payable in cash but acceptable at their face value only in payment of such future taxes, and provided further that the issuance of such refunding bonds and of such tax payment certificates be approved by the Municipal Finance Commission. It is the intention of this act that such municipalities and boards of education may issue both refunding bonds and tax payment certificates as hereinabove provided in such proportions as may be determined by them, or may issue such refunding bonds only or such tax payment certificates only, as may be determined by them, in payment of all or any part of the balance due to the holders of the bonds presented in payment of the purchase price of said tax title liens and assessment title liens or said real property.

(b) Tax payment certificates issued hereunder shall be authorized and issued in accordance with the procedure for the issuance of refunding bonds, and may be in such form as shall be determined by the governing body of the municipality, and shall be signed by such officers as may be designated by said governing body.

(c) No municipality may avail itself of the authority contained in this section for the acceptance of bonds in payment of the purchase price of real property and tax title liens and assessment title liens except that the sale of such property and liens shall be an integral part of the comprehensive refunding program, which program shall have received the consent of the holders of at least eighty-five per centum of the amount of bonds outstanding. (Added by P. L. 1936, Ch. 265.)

ARTICLE III.

Additional Powers.

301. For the purpose of enabling the commission to carry out this act, the commission shall have power to appoint a secretary and counsel, to employ an auditor and such other assistants, legal, clerical or otherwise, and to fix their duties, terms and service and compensation, and to incur such other expenses as it may deem necessary, but no expenses (other than expenses directly attributable to the municipality such as costs of issuing notes or bonds of the municipality and the costs of audit) shall be incurred exceeding $10,000 in any one municipal fiscal year for any one municipality without the approval of a justice of the Supreme Court. The secretary shall keep minutes of the transactions and proceedings of the commission and shall be the official reporter of the proceedings of the commission. (As amended by P. L. 1932, Ch. 236.)

301-a. The expenses certified from time to time by the commission shall be a legal charge upon the municipality and may be paid by the issuance of emergency notes or bonds, but if not so paid prior to the end of the fiscal year shall be included in the budget of the ensuing year. (Added by P. L. 1932, Ch. 236.)

302. Such auditor shall have an adequate office in the municipal building, if any, and shall have access to all books of account, records, papers and memoranda of such municipality.

302-a. All warrants, checks or other instruments for the withdrawal or transfer of funds of the municipality shall be submitted to such auditor for his countersigna-

ture and no banking institution in which funds of the municipality has heretofore been or shall hereafter be deposited shall honor warrants or checks drawn thereon unless the countersignature of such auditor shall appear on the face of such instruments. (Added by P. L. 1933, Ch. 330.)

303. Notice of all appeals from taxation affecting such municipality shall be given by the county board of taxation to such auditor, and the commission shall be entitled to be represented at hearings on all such appeals.

304. The commission shall from time to time certify to the proper officials of the municipality the amount of its expenses, which amount shall be forthwith raised and paid to the commission.

305. The expense of issuing and selling any notes or bonds under this act, including estimated cost of printing, advertising, attorneys' fees, execution, certification, exchange and delivery, may be included by the commission in the amount of indebtedness to be funded or refunded under this act. (As amended by P. L. 1932, Ch. 236.)

306. The commission shall have the power to require the municipality to cause to be made an assessment and/or reassessment and/or valuation and/or revaluation and/or appraisal and/or reappraisal of the taxable ratables of the municipality as the basis for any subsequent tax levy; and any tax duplicate based on such assessment and/or reassessment and/or valuation and/or revaluation and/or appraisal and/or reappraisal shall be used for all purposes in connection with the levy, apportionment and collection of taxes. For such

urpose and/or purposes the governing body of the unicipality shall have power to employ such experts r appraisers as it may deem advisable. (As amended y P. L. 1931, Ch. 384, and P. L. 1932, Ch. 236.)

307. The cost of such assessment and/or re-assess-ent and/or valuation and/or revaluation and/or ap-raisal and/or reappraisal, whether or not directed by he commission, shall at the request of the governing ody, be included in the amount of indebtedness to be efunded under this act. (As amended by P. L. 1931, h. 384, and P. L. 1932, Ch. 236.)

ARTICLE III-A.

(Added by P. L. 1932, Ch. 236.)

Remedies.

351. Whenever the municipal finance commission hall function in any municipality and so long as it shall ontinue so to do, no judgment, decree, levy or execution gainst such municipality or the property thereof for he recovery of the amount due on any bonds, notes or ther obligations of the municipality, in the payment of hich such municipality has defaulted, shall be enforced ntil otherwise specially ordered by the Supreme Court r a justice thereof in an appropriate proceeding for uch purpose, after notice to the commission, and the nforcement of any such judgment, decree, levy or xecution shall be and it hereby is stayed until other-ise specially ordered as aforesaid. (Added by P. L. 932, Ch. 236, and amended by P. L. 1933, Ch. 330.)

352. Whenever the municipal finance commission hall function in any municipality and so long as it shall

continue so to do, no action or proceeding of any kind either direct or ancillary, by way of mandamus or otherwise shall be brought against such municipality or any public officers for the assessment, levy or collection of taxes by or for such municipality and any and all actions or proceedings therefor shall be and they hereby are stayed; except that first, the Supreme Court or a justice thereof, after notice to the commission, may authorize one or more creditors of such municipality to bring and maintain an action or proceeding therefor in the Supreme Court, which shall be brought for the benefit of themselves and all other creditors of such municipality and in which all other creditors of such municipality shall have the right to intervene and assert their claim and in which all other creditors of such municipality may, and said commission shall, be made parties in such manner and upon such notice as the Supreme Court shall approve; and except that, second, the municipal finance commission may bring and maintain an action or actions by way of mandamus or by any other appropriate proceeding or proceedings for the assessment, levy or collection of taxes by such municipality for the payment of principal and/or interest of the indebtedness of the municipality found to be outstanding as provided in section two hundred and one of this act. Without limiting its power otherwise to direct by mandamus the assessment, levy or collection of taxes, the Supreme Court in any such proceeding may, to the extent which it shall deem just and equitable, afford to the holders collectively of any due and unpaid claims against a municipality any remedy which might be afforded under any other law to any individual creditor in any mandamus proceeding for the assessment, levy or collection of taxes, to the same extent as if there had been an entry of judgment in their favor, issuance of execution and return thereof unsatisfied, service thereof upon

public officials and performance of any and all other conditions precedent to the affording of such relief by mandamus under such other law; *provided, however,* that the court be first satisfied from proof submitted by affidavit or otherwise that the claims for the enforcement of which such remedy is sought are claims upon which a judgment could be obtained. (Added by P. L. 1932, Ch. 236, and amended by P. L. 1933, Ch. 330, and P. L. 1936, Ch. 50.)

353. Whenever the municipal finance commission shall function in any municipality, and so long as it shall continue so to do, it may prepare and certify to the governing body of such municipality resolutions providing in substance that any and all moneys collected as taxes by the municipality over and above an amount sufficient to pay the reasonable current operating expenditures of such municipality (not including therein the principal or interest of any bonds or notes of the municipality) and such capital expenditures, if any, as may be approved by the municipal finance commission as reasonably necessary to preserve the value of the taxable property within such municipality, shall be paid by the municipality to such banks or trust companies as the governing body of the municipality may designate. (Added by P. L. 1932, Ch. 236.)

354. Whenever the municipal finance commission shall function in any municipality and so long as it shall continue to do so, no action or proceeding at law or in equity shall be brought or prosecuted, the purpose of which is to affect the disposition of property or funds owned or controlled by the municipality, except as provided in this act. If any such municipality has in its possession or under its control, or there is in the possession or under the control of the commis-

sion, any property or funds of such municipality which are or may be available for the payment of interest or principal upon any of the debts of such municipality (over and above the payment of the current operating expenses of the municipality and the maintenance of a reasonable working capital), then such municipality in its discretion may apply, or if directed by the commission shall apply, to the Supreme Court to determine the application and distribution of such property or funds to and among the creditors of the municipality, and in any such case the Supreme Court in its discretion may permit an application for relief of the same character to be made by any creditor of the municipality. In any such proceeding all creditors of the municipality shall be made parties thereto in such manner and upon such notice by publication or otherwise as the Supreme Court shall approve, and any creditor may appear therein and assert his rights to receive all or any part of such property or funds. In case any such proceeding shall be instituted, the Supreme Court may direct the municipality to make no payments from any of such moneys so available until the determination of the proceeding or until permitted by the Supreme Court. Unless and until such a direction shall be made, payments may be made by such municipality on account of principal and interest as the municipality may determine and as may be approved by the Municipal Finance Commission. (Added by P. L. 1935, Ch. 191, and amended by P. L. 1935, Ch. 314.)

355. Upon the application of any creditor made upon notice to the municipality and the commission, the Supreme Court may vacate, modify or restrict any statutory stay contained in this article. (Added by P. L. 1936, Ch. 50.)

ARTICLE IV.

Miscellaneous.

401. The act of a majority of the commission shall be deemed the act of the commission. The members of the commission are hereby authorized and empowered to sit singly for the purpose of holding any public hearings. The commission is authorized and empowered to issue subpoenas, signed by a majority of the commission to compel the attendance of witnesses before it, and the production of books, papers and records. It is authorized to hold hearings and administer oaths to witnesses. In the event of failure to obey any subpoena issued as aforesaid, or refusal to answer questions propounded by the commission, such failure or refusal shall be certified to the justice of the Supreme Court, presiding in the circuit wherein such neglect or refusal occurred, which said justice is authorized to impose penalties for such failure or refusal. (As amended by P. L. 1931, Ch. 384, and P. L. 1932, Ch. 236.)

402. Whenever any direction of the commission authorized under this act has not been fully performed or carried out by the officials of the municipality affected, the commission shall have power to perform directly, or cause to be performed by its agents, in the name of the municipality, any act so directed by the commission under the provisions of this statute, including the power to execute, sell, issue and deliver any bonds or notes directed to be issued under a resolution certified in accordance with section 201 of this act.

402-a. The word "certified" as used in this act shall as to resolutions hereafter prepared by the commission and certified to the governing body of a municipality be

construed to mean transmission by first class mail of a copy of a resolution of the commission, accompanied by a certificate substantially in the following form: "The annexed resolution is hereby certified by the municipal finance commission to the (insert name of governing body of municipality) pursuant to chapter three hundred and forty of the pamphlet laws of one thousand nine hundred and thirty-one, as amended." Such certificate shall be signed in the name of the commission by at least a majority of its members under its common seal, and attested by its secretary. (Added by P. L. 1932, Ch. 236.)

403. The commission hereby created shall continue in force in such municipality, and shall exercise the powers and perform the duties herein conferred, until all bonds or notes or other indebtedness of the municipality which has fallen due, and all bonds or notes which will fall due within one year, and the interest thereon, have been paid or funded or refunded, or the payment thereof in cash adequately provided for by a cash reserve, excepting tax anticipation or tax revenue notes or bonds of the current year, at which time its authority under this act shall cease. Thereafter the Commissioner of Municipal Accounts shall have the power to continue the employment of the auditor as provided for in section three hundred one and to exercise the powers of the commission under section two hundred nine, until the gross and net debt of such municipality, including notes or bonds issued under this act, is within all statutory limits, at which time his authority under this act shall cease. (As amended by P. L. 1933, Ch. 330.)

404. The powers granted and the duties imposed by this act shall be construed to be independent and severable. If any one or more sections, clauses, sentences, or

parts of this act shall for any reason be questioned in any court, and shall be adjudged unconstitutional or invalid, such judgment shall not affect, impair or invalidate the remaining provisions thereof, but shall be confined in its operation to the specific provision so held unconstitutional or invalid.

405. It is declared and enacted that this act is intended by the Legislature to meet the public emergency arising from a default in the payment of municipal obligations, and the resulting impairment of public credit, requiring intervention by the State to provide for the payment of existing obligations in such a way as to cause the least embarrassment to property owners as taxpayers; that this act is remedial in nature, and that the powers hereby granted shall be liberally construed.

406. This act shall take effect immediately, and, as to the subject matters hereof, shall supersede the provisions of all other laws. (As amended by P. L. 1933, Ch. 330.)

SUPPLEMENTS

Chapter 331, Laws 1933

AN ACT to supplement an act entitled "An act concerning municipal finances," approved April twenty-eighth, one thousand nine hundred and thirty-one, constituting chapter three hundred and forty of the laws of one thousand nine hundred and thirty-one.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. Whenever, pursuant to the act of which this act is a supplement, the municipal finance commission, hereinafter sometimes referred to as the "commission," shall

function in any municipality, then, upon the verified petition of any creditors of such municipality made on behalf of themselves and all other creditors of the municipality for the approval of a plan of adjustment or composition of the claims of all creditors or of a class or classes of them similarly situated, which plan shall be submitted with and made a part of the petition, the Supreme Court by a justice thereof may take jurisdiction of the subject matter and order the filing of the petition in the office of the clerk of the Supreme Court. The municipality and the commission shall be made parties to such proceeding. All creditors of the municipality shall be made parties thereto by notice to be published and given in such manner as the Supreme Court by its justice may direct. Any creditor of the municipality may appear and assert his rights. In the petition the creditors shall allege that the municipality is or will be unable to pay in full according to their terms the claims proposed to be adjusted or composed and perform its public functions and preserve the value of property subject to taxation; that the adjustment or composition proposed in the plan is substantially measured by the capacity of the municipality to pay, is in the interests of all the creditors affected thereby, and is not detrimental to other creditors of the municipality.

2. In any such proceeding, after hearing on the plan proposed or on the plan as modified by order and if such plan as proposed or modified is approved in writing by creditors representing eighty-five per centum (85%) in amount of the indebtedness affected thereby and by the municipality and the commission, the Supreme Court by a justice thereof may by order authorize and approve such adjustment or composition if the court by its justice determines (1) that the municipality is unable to pay in full according to their terms the claims proposed to be adjusted or composed, and perform its public func-

tions and preserve the value of property subject to taxation, (2) that the adjustment or composition is substantially measured by the capacity of the municipality to pay, (3) that it is in the interest of all the creditors affected thereby, and (4) that it is not detrimental to other creditors of the municipality.

3. The plan of adjustment or composition so authorized and approved shall forthwith and without any further action of any kind be binding upon all the creditors included in such plan, whether or not they appear in such proceeding, and insofar as said plan provides for the substitution of any new bonds, notes, or other obligations of the municipality in place of any outstanding bonds, notes or other obligations or claims then outstanding, such substitution shall be effectual from and after such date as may be fixed in such order.

4. After the institution of any proceeding provided for by this act and pending the determination thereof, the Supreme Court by a justice thereof may by order continue the stay provided by the act of which this act is a supplement. In the event that a plan shall be authorized and approved pursuant to this act, the court shall retain jurisdiction of such proceeding and thereafter no creditor whose claim is included in such adjustment or composition shall be authorized to bring any action or proceeding of any kind or character for the enforcement of his claim except with the permission of the Supreme Court and then only to recover and enforce the rights given to him by such adjustment or composition.

5. Notwithstanding any provisions of this act, the municipal finance commission shall not approve any adjustment or composition, or plan presented pursuant to this act, which provides for the reduction in the principal amount of any outstanding notes or bonds of the municipality.

Approved June 27, 1933.

Chapter 375, Laws 1933

A SUPPLEMENT to an act entitled "An act concerning municipal finances," approved April twenty-eighth, one thousand nine hundred and thirty-one.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. In any case where a justice of the Supreme Court has heretofore or hereafter made an order annulling, vacating and discharging any order theretofore made by such justice pursuant to the provisions of the act entitled "An act concerning municipal finances," approved April twenty-eighth, one thousand nine hundred and thirty-one, adjudging that the municipality has defaulted in the payment of the principal or interest of any of its outstanding notes or bonds, the municipal finance commission constituted upon the filing of such last mentioned order by the provisions of said act shall cease to continue in force in such municipality and neither said commission nor the State Commissioner of Municipal Accounts shall thereafter exercise any powers or perform any duties in and for such municipality pursuant to said act, or any act amendatory thereof or supplemental thereto; *provided, however,* that said municipal finance commission shall have heretofore or hereafter determined by resolution that it is not functioning in said municipality.

2. This act is to take effect immediately.

Approved September 5, 1933.

Chapter 190, Laws 1935

AN ACT to supplement an act entitled "An act concerning municipal finances," approved April twenty-eighth, one thousand nine hundred and thirty-one, constituting chapter three hundred forty of the laws of one thousand nine hundred and thirty-one, as amended.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. Whenever, pursuant to the act to which this act is a supplement, the Municipal Finance Commission, hereinafter sometimes referred to as the "commission" shall function in any municipality, any such municipality may file a petition with any United States court of bankruptcy under an act of the Congress of the United States entitled "An act to amend an act entitled 'An act to establish a uniform system of bankruptcy throughout the United States,' approved July first, one thousand eight hundred and ninety-eight, and acts amendatory thereof and supplemental thereto," approved May twenty-fourth one thousand nine hundred and thirty four, for the purpose of effecting a readjustment of its debts. No such petition nor any plan of readjustment in connection therewith shall be filed with the court by any municipality, however, unless the same shall be accompanied by the written approval of the commission, and no plan of readjustment shall be put into temporary effect or finally confirmed without the written approval of the commission of such plan. The municipality shall give the commission at least ten days notice in writing of all hearings and other proceedings before the court of bankruptcy or any special master in connection with any such petition or plan of readjustment.

2. The commission shall have power in its discretion to give its written approval of any petition proposed to be filed by any municipality hereunder and of any plan of readjustment of its debt filed with or in proceedings upon such petition; *provided, however,* that notwithstanding any provision of this act, the commission shall not approve any plan of readjustment which provides for the reduction in the principal amount of any outstanding notes or bonds of such municipality.

3. This act shall take effect immediately.

Approved May 15, 1935.

Chapter 194, Laws 1935

AN ACT to supplement an act entitled "An act concerning municipal finances," approved April twenty-eighth, one thousand nine hundred and thirty-one, constituting chapter three hundred forty of the laws of one thousand nine hundred and thirty-one, as amended.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. Whenever, pursuant to the act of which this act is a supplement, the municipal finance commission, hereinafter sometimes referred to as the "commission," shall function in any municipality, then such municipality may with the approval in writing of such commission extend the period theretofore granted for the payment of assessments for benefits for local improvements, by granting to the owner of the property so assessed the privilege of paying in five additional equal annual installments the amount of all such assessments con-

firmed and due and payable, by reason of a default or otherwise, as the date of the resolution hereinafter mentioned, and of the interest thereon and penalties and other charges relating to such assessments accrued to such date. Such action shall be taken by resolution of the governing body of the municipality describing with clearness sufficient for identification the property so affected, the amount of such assessments, interest, penalties and other charges, and the annual dates when the installments of such amount shall thereafter be due and payable. Such resolution shall not take effect until approved in writing by the commission after public notice published in a newspaper having a substantial circulation in the municipality. There need not be a separate resolution for each property or property owner.

2. This act shall take effect immediately.

Approved May 15, 1935.

Chapter 195, Laws 1935

A SUPPLEMENT to an act entitled "An act concerning municipal finances," approved April twenty-eighth, one thousand nine hundred thirty-one, constituting chapter three hundred forty of the laws of one thousand nine hundred thirty-one, as amended and supplemented.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. Whenever, pursuant to the act to which this act is a supplement, the municipal finance commission, hereinafter referred to as the "commission," shall function

in any municipality and there is a school district coterminous with such municipality governed by the provisions of article VII of an act entitled "An act to establish a thorough and efficient system of free public schools, and to provide for the maintenance, support and management thereof," approved October nineteenth, one thousand nine hundred and three, hereinafter referred to as the "school law," the commission shall have power from time to time to prepare and certify to the board of education of such school district resolutions providing for the funding or refunding of notes or bonds or other indebtedness of the school district, and the interest thereon, which the commission shall have found, after public hearing, to be outstanding and unpaid and to be due or to become due. Such funding or refunding shall be carried out in accordance with the provisions of the act to which this act is a supplement, and shall not be subject to a referendum or to the other provisions of the school law. Such school district and the board of education thereof shall be subject to all the provisions of the act to which this act is a supplement, as heretofore or hereafter amended or supplemented and the board of education of such school district shall be deemed to be the governing body of such school district within the meaning of and for all the purposes of said act, as so amended and supplemented.

2. This act shall take effect on July first, one thousand nine hundred and thirty-five.

Approved May 15, 1935.

Chapter 292, Laws 1935

AN ACT to supplement an act entitled "An act concerning municipal finances," approved April twenty-eighth, one thousand nine hundred and thirty-one, constituting chapter three hundred forty of the laws of one thousand nine hundred and thirty-one, as amended.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. Whenever, pursuant to the act to which this act is a supplement, the municipal finance commission, hereinafter referred to as the "commission," shall function in any municipality, the auditor appointed by the commission in and for such municipality shall, upon the adoption by the commission of a resolution providing therefor, have with respect to such municipality authority to recommend the tentative annual budget to the governing body thereof and to the commission; to review all contracts prior to their execution and their authorization by the governing body; to make recommendations concerning all capital improvements; to attend all meetings of the governing body with the right to take part in discussions but without the right to vote on any matters; to investigate the affairs of any department, officer, department head, employee, subordinate or assistant of such municipality; and to make recommendations with respect to any or all matters aforesaid both to the governing body and to the commission.

[2. Whenever, pursuant to the act to which this act is a supplement, the commission shall function in a municipality, it shall have, in addition to the powers

granted in the foregoing section hereof, the power by resolution to make to the governing body of such municipality recommendations with respect to the annual budget or tax ordinance, and whenever the commission shall deem it necessary in order to conserve the financial resources of the municipality and maintain essential governmental services, it may by resolution determine, after hearing, the maximum amount for any purpose of expenditure or for any estimate of revenue which may be included in any annual budget or tax ordinance and certify the same to the governing body of the municipality and to the county board of taxation, and no appropriation or tax levy for any purpose and no estimate of revenue shall to the extent that it exceeds the maximum amount so fixed by the commission be valid or effective.] (Repealed by P. L. 1936, Ch. 10.)

3. Whenever, pursuant to the act to which this act is a supplement, the commission shall function in a municipality, it shall have, in addition to the powers granted in the foregoing sections hereof, the power, and it shall be its duty, to certify by resolution to the governing body and to the officer or employee concerned any failure on the part of such officer or employee of such municipality to perform any duty imposed upon such officer or employee under the provisions of any statute, local ordinance or regulation. Unless prior to the thirtieth day following the date of such certification, the governing body and the commission shall by resolution declare that such officer or employee has satisfactorily undertaken the performance of such duty, the governing body shall by resolution either remove, or suspend, with or without pay, such officer or employee: *provided, however,* that nothing herein contained shall be deemed to authorize the removal or suspension hereunder without pay of any elected officer, but such officer

may be suspended hereunder with pay for the remainder of his term of office. Upon the removal or suspension hereunder of any officer or employee, it shall be the duty of the governing body, with the concurrence and approval of the commission, to appoint a person or persons satisfactory to the governing body and to the commission to perform the duties of such officer or employee. In the event that no such satisfactory person can be found to perform such duties who is a resident of the municipality, it shall be lawful to appoint a person residing outside of the municipality.

4. Whenever, pursuant to the act to which this act is a supplement, the commission shall function in a municipality, it shall have, in addition to the powers granted in the foregoing sections hereof, the power by resolution to recommend to the governing body of such municipality the appointment of one or more persons to act as special collectors of delinquent taxes or any other revenues in such municipality. Thereupon it shall be the duty of the governing body, with the concurrence and approval of the commission, to appoint a person or persons satisfactory to the governing body and to the commission to act as such special collector or collectors and to fix his or their compensation, and it shall be lawful so to appoint a person or persons residing outside of the municipality.

5. The commission shall have power from time to time by resolution to direct that for such period as may be stated in such resolution the proceeds of any taxes collected, received, or realized in any manner during such period shall be applied equally and ratably to the purposes for which such taxes were levied.

6. Any resolution adopted by the commission pursuant to this act may be certified to the municipality by the commission in the manner provided in section four hundred two-A of the act to which this act is a supplement, and when so certified the provisions of such resolution shall be binding upon such municipality.

7. This act shall take effect immediately.

Approved June 27, 1935.

Chapter 127, Laws of 1936

AN ACT to supplement an act entitled "An act concerning municipal finances," approved April twenty-eighth, one thousand nine hundred and thirty-one, constituting chapter three hundred forty of the laws of one thousand nine hundred and thirty-one, as amended and supplemented.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. Article III-A of the act to which this act is a supplement shall not apply to bonds hereafter issued by any municipality pursuant to said act, nor to actions or proceedings for the enforcement of such bonds, nor to the enforcement of any judgment, decree, levy or execution for the recovery of the amount due on such bonds.

2. This act shall take effect immediately.

Approved June 1, 1936.

OTHER ACTS PERTAINING TO THE MUNICIPAL FINANCE COMMISSION

Chapter 382, Laws 1933

AN ACT concerning the investment of moneys or funds by boards, commissions, officers of the State and heads of departments of the State government.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. All boards, commissions, officers of the State and heads of departments of the State Government authorized to invest moneys or funds are hereby authorized to invest moneys or funds in their possession in the notes, bonds or other obligations of any municipality of the State which has heretofore been or shall hereafter be issued pursuant to a resolution adopted by the proper officers of such municipality in a form certified by the municipal finance commission or issued with the approval in writing of such commission.

2. The words "municipal finance commission" shall mean the commission created by an act entitled "An act concerning municipal finances," approved April twenty-eighth, one thousand nine hundred and thirty-one, constituting chapter three hundred and forty of the Pamphlet Laws of one thousand nine hundred and thirty-one, and the acts amendatory thereof and supplemental thereto, and having and exercising with respect to such municipality the powers and duties prescribed by said act.

3. The powers conferred by this act shall be in addition to the powers conferred by every other law and notes, bonds and other obligations may be purchased hereunder notwithstanding the restrictions contained in any other laws.

4. This act shall take effect immediately.

Approved September 5, 1933.

Chapter 154, Laws 1935

AN ACT to amend an act entitled "An Act creating a Department of Municipal Accounts and the office of Commissioner of Municipal Accounts, and defining his duties and powers," approved March twenty-seventh, one thousand nine hundred and seventeen.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. An act entitled "An act creating a Department of Municipal Accounts and the office of Commissioner of Municipal Accounts, and defining his duties and powers," approved March twenty-seventh, one thousand nine hundred and seventeen, be and the same hereby is amended by inserting after section three thereof a new section to be numbered and to read as follows:

3-a. Whenever a municipal finance commission shall be functioning in any municipality pursuant to the provisions of any other law, the Commissioner of Municipal Accounts may issue no order with respect to the budget or the tax ordinance or tax levy of such municipality pursuant to the provisions of subdivision (d) of section three hereof except upon the direction of such municipal finance commission.

2. This act shall take effect immediately.

Approved April 11, 1935.

Chapter 193, Laws 1935

AN ACT concerning the financial difficulties of counties, municipalities, school districts, or other political subdivisions of this State.

WHEREAS, By an act of Congress of the United States entitled "An Act to amend an act entitled 'An act to establish a uniform system of bankruptcy throughout the United States,' approved July first, one thousand eight hundred and ninety-eight, and acts amendatory thereof and supplementary thereto," approved May twenty-fourth, one thousand nine hundred and thirty-four, the Congress of the United States has undertaken the further exercise of the bankruptcy powers because of the national emergency caused by increased financial difficulties of many local governmental units; and

WHEREAS, Pursuant to said act of the Congress of the United States divers counties, municipalities, school districts or other political subdivisions of this State may desire to effect a readjustment of their debts and to procure the discharge of debts and liabilities provided for in said act; and

WHEREAS, Public and recorded confession that it is insolvent or unable to meet its debts as they mature must be made by any county, municipality, school district or other political subdivision desiring to take action under said act of the Congress of the United States; and

WHEREAS, Said act of the Congress of the United States reserves to the State the power to control the actions of its counties, municipalities, school districts or other political subdivisions under said act; now, therefore,

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. Any county, municipality, school district or other political subdivision of this State (hereinafter referred to as "political subdivision") shall have power to file a petition or petitions with any United States court or court in bankruptcy under an act of the congress of the United States entitled "An act to amend an act entitled 'An act to establish a uniform system of bankruptcy throughout the United States,' approved July first, one thousand eight hundred and ninety-eight, and acts amendatory thereof and supplementary thereto," approved May twenty-fourth, one thousand nine hundred and thirty-four (hereinafter referred to as the "municipal bankruptcy act"), for the purpose of effecting a readjustment of its debt. Such petition or petitions shall not be so filed unless the approval of the municipal finance commission constituted by section one hundred two of an act of the Legislature of the State of New Jersey entitled "An act concerning municipal finances," approved April twenty-eight, one thousand nine hundred and thirty-one, constituting chapter three hundred forty of the laws of one thousand nine hundred and thirty-one, as amended and supplemented, which is hereby constituted a commission for the purposes of this act, be first had and obtained.

2. The filing of such petition shall be authorized only by ordinance of the governing body of the political subdivision adopted by the affirmative vote of not less than two-thirds of all the members elected to such governing body, except that in the case of a county or of a school district governed by the provisions of Article VII of an act entitled "An act to establish a thorough and efficient system of free public schools, and to provide for the maintenance, support and management thereof,"

pproved October nineteenth, one thousand nine hun-
red and three, as amended and supplemented, such
iling shall be authorized by resolution of the governing
ody adopted by the affirmative vote of not less than
wo-thirds of all the members elected to such govern-
ng body. For the purposes of this act the board of
ducation of a school district governed by the provisions
f article VII of an act entitled "An act to establish
thorough and efficient system of free public schools,
nd to provide for the maintenance, support and man-
gement thereof," approved October nineteenth, one
housand nine hundred and three, as amended and sup-
lemented, shall be deemed to be the "governing body"
f such school district.

3. No plan of readjustment filed with or in the pro-
eedings upon any such petition shall be approved by
he court or put into temporary effect or finally con-
irmed without the approval of the municipal finance
ommission.

4. The municipal finance commission shall have power
n its discretion to give its approval in the manner
provided by this act to the filing of any petition for
he purpose of effecting readjustment of its debt which
any political subdivision proposes to file, and of any
plan of readjustment filed with or in the proceedings
pon any such petition; *provided, however,* that no such
plan of readjustment shall provide for the reduction of
he principal amount of any outstanding notes or bonds
f the political subdivision nor, without the express
approval in writing of the municipal finance commis-
sion, for the payment of fees, compensation, reimburse-
ment or other allowances for attorneys, agents, com-
mittees, or other representatives of creditors of the
political subdivision. (As amended by P. L. 1935, Ch.
313.)

5. Upon the final confirmation of any plan of readjustment approved by the municipal finance commission, the political subdivision assenting to such plan of readjustment shall have power, by ordinance in the case of a municipality, by resolution in the case of a county, and by resolution of the board of education in the case of a school district governed by the provisions of article VII of an act entitled "An act to establish a thorough and efficient system of free public schools, and to provide for the maintenance, support and management thereof," approved October nineteenth, one thousand nine hundred and three, as amended and supplemented to authorize, issue, sell and deliver such bonds, notes or other obligations and enter into such agreements and do such other acts and things as may be required of it pursuant to said plan of readjustment. The full faith and credit of the political subdivision shall be deemed to be pledged for the payment of such notes, bonds or other obligations. Such ordinance or resolution, as the case may be, shall not take effect until approved by the municipal finance commission, and shall provide for the issuance of bonds in one or more series, bearing such date or dates, maturing at such time or times, bearing interest at such rate or rates of interest, not exceeding six per centum (6%) per annum, payable at such time or times, in such denominations, in such form, either coupon or registered, carrying such registration privileges, payable in such medium of payment at such place or places, subject to such terms of redemption, with or without premium, as the municipal finance commission may approve.

6. The approval of any petition, plan of readjustment or other papers to be filed in any United States court or court in bankruptcy, or of any ordinance or resolution shall be requested by filing in the office of the

municipal finance commission a certified copy of a resolution of the governing body of the political subdivision adopted by the affirmative vote of not less than two-thirds of all the members elected to such governing body, requesting such approval, together with a true and correct transcript duly certified of any proceedings relating to such petition, plan of readjustment, other papers, ordinance or resolution, and the authorization thereof, accompanied by, in the case of documents to be filed in the United States court or court in bankruptcy, the original and one certified copy of such documents, and in the case of an ordinance or resolution, two certified copies of such ordinance or resolution. The approval of the municipal finance commission under this act of any petition, plan of readjustment or other papers filed or to be filed in a United States court or court in bankruptcy, shall be evidenced only by written endorsement thereof on the petition, plan of readjustment or other papers so filed and the approval of the municipal finance commission under this act of any ordinance or resolution of the governing body of any political subdivision shall be evidenced only by written endorsement thereof on a certified copy of such ordinance or resolution.

7. This act shall take effect immediately.

Approved May 15, 1935.

Chapter 258, Laws 1935

AN ACT to supplement an act entitled "An act to establish a thorough and efficient system of free public schools, and to provide for the maintenance, support and management thereof," approved October nineteenth, one thousand nine hundred and three.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. School districts to which applicable; power to fund or refund debts. Whenever, pursuant to an act entitled "An act concerning municipal finances," approved April twenty-eighth, one thousand nine hundred thirty-one, constituting chapter three hundred forty of the laws of one thousand nine hundred thirty-one, as amended and supplemented, hereinafter referred to as the "commission act", the municipal finance commission, hereinafter referred to as the "commission", shall function in a municipality having a school district coterminous therewith which is governed by the provisions of Article VII of the act to which this act is a supplement, hereinafter referred to as the "school law", the commission shall have power from time to time to prepare and certify to the board of education of such school district, in the manner and mode of procedure provided in the commission act, resolutions providing for the funding or refunding of notes or bonds or other indebtedness of such school district, and the interest thereon, which the commission shall have found after public hearing to be outstanding and unpaid and to be due or to become due. The commission may include in the amount of indebtedness to be funded or refunded the expense of issuing

and selling notes or bonds hereunder, including the estimated cost of printing, advertising, attorney's fees, execution, certification, exchange and delivery.

2. Public hearings on resolution; adoption. Any proposed resolution providing for the issuance of notes or bonds, if such notes or bonds are payable more than one year from the date of issue, shall be certified as aforesaid only after a public hearing by the commission; but no resolution or amendment thereto determining or altering the form of notes or bonds or providing for their sale, execution or delivery shall require any public hearing before such certification.

3. Adoption upon direction of commission. Such resolutions shall, on direction of the commission, be adopted by the board of education of such school district, by the vote of a majority of the members thereof, in the form certified by the commission.

4. Other laws inapplicable. Such resolutions and any notes or bonds authorized to be issued thereunder shall not be subject to a referendum of the legal voters of the school district or to the limitations or other provisions of any other act.

5. Form of notes or bonds. Subject only to the limitations of this act, such resolution or resolutions supplemental thereto shall determine the terms and the form of notes or bonds to be issued thereunder. Such notes or bonds may be subject to such terms of redemption, with or without premium, and contain such provisions, conditions and limitations with respect to the acceleration of the obligation to pay the principal thereof upon such default in the payment of the interest on or principal of any bonds or notes, or in respect to the pro-

visions concerning debt service and sinking fund payments, as the resolution authorizing their issuance may provide. Any notes or bonds issued under this act in exchange for any instrument issued under any other act may be authorized by such resolution or resolutions to contain a provision that, in case of default in payment of the principal of or interest on any such note or bond, the holder thereof shall not only have all his rights and remedies thereunder, but in addition shall be reinvested with such of the rights or remedies which he would have had were he then the owner and in possession of the instrument in exchange for which such note or bond shall have been issued, as may be specified in such resolution. Such notes or bonds may contain such reference to any special covenants or provisions contained in the resolution authorizing their issuance and such other terms, provisions or conditions not inconsistent herewith as may be deemed by the commission to give said notes or bonds a higher degree of marketability as the resolution or resolutions determining the form of the notes or bonds may provide. All notes or bonds issued under this act containing any one or more of such references, terms, provisions, or conditions shall be deemed negotiable instruments, the provisions or limitations of any other law to the contrary, notwithstanding; *provided, however,* that nothing in this section shall be construed to impair the negotiability of any other instruments negotiable under other laws of this State. (As amended by P. L. 1936, Ch. 251.)

6. Collateral agreements. To the end that the principal of and interest on the notes or bonds issued hereunder may be further secured and thereby a more favorable sale or exchange effected, any resolution authorizing the issuance of notes or bonds hereunder may contain provisions which shall be a part of the contract with

he holders of such notes or bonds as to (a) the amount
be raised by taxation in the school district in each
ear for debt service and for reserve or sinking funds
hich amount may be expressed in dollars, percentage
f total assessed valuations or both, or otherwise; (b)
he setting aside of reserve or sinking funds and the
mount, source, securing, regulation, investment, appli-
tion and disposition thereof; (c) the pledging, de-
siting or trusteeing of moneys to be applied to the
ayment of the principal of and interest on the notes
r bonds, and the securing of such deposits; (d) the
edging of taxes and other revenues or moneys of the
hool district directly to the payment of the principal
f and interest on the notes or bonds, or to reserve or
nking funds; (e) limitations effective for not exceed-
g ten years from the effective date of such resolution
r resolutions on the amount or nature of borrowing or
curring of indebtedness by the school district; (f)
ppointment of a fiscal agent by the school district and
he powers and duties thereof; (g) the terms and condi-
ons upon which such resolution or resolutions or any
ontract entered into thereby may be amended, rescinded
r repealed; (h) any other or further course of conduct
n the part of the school district which may tend to im-
rove its credit standing. Any school district adopting
resolution containing any provision authorized here-
nder shall have and possess all of the powers neces-
ary and appropriate for the performance thereof. The
rovisions of any such resolution shall be enforceable
y mandamus or other appropriate action or proceeding
t law or in equity instituted by the commission or by
he holder of any note or bond on behalf of all the
olders of such notes or bonds, whether or not there
hall have been any default in the payment of the prin-
pal of or interest on any such notes or bonds. (As
mended by P. L. 1936, Ch. 251.)

6 (a) Sinking fund commission. Any resolution authorizing the issuance of notes or bonds hereunder may provide that any sums required pursuant to such resolution to be set aside by the school district for reserve or sinking funds shall be paid to the sinking fund commission of such school district, and all moneys so paid to such commission shall be held and applied by it only as in such resolution provided and shall not be commingled with any other moneys held by such commission. The provisions of an act entitled "An act concerning sinking funds and sinking fund commissions," approved March twenty-ninth, one thousand nine hundred and seventeen, as amended and supplemented, in so far as they relate to the creation, setting aside or maintenance of sinking funds and the investment, application and disposition thereof, shall have no application with respect to notes or bonds issued under this act or any reserve or sinking funds provided therefor. (Added by P. L. 1936, Ch. 251.)

6 (b) Release of sinking funds. Any resolution authorizing the issuance of notes or bonds hereunder may provide that the notes, bonds or other obligations of the school district then held by the sinking fund commission thereof shall be cancelled and that other property or funds in the custody of such commission shall be applied to the payment of other indebtedness of the school district as in such resolution provided, and said commission shall cancel said notes, bonds or other obligations and apply such property or funds accordingly; *provided, however,* that nothing herein contained shall be deemed to permit, without the consent of such holder, the impairment of any rights of the holder of any note, bond or other obligation of the school district for the security or payment of which any such notes, bonds, obligations, property or funds shall be held. (Added by P. L. 1936, Ch. 251.)

7. Sale or exchange of notes or bonds. Subject only to the limitations of this act, such resolution or resolutions supplemental thereto shall provide for the sale or exchange and the execution and delivery by such officers of the school district as shall be therein designated, of the notes or bonds to be issued thereunder, and it shall be mandatory upon such officers to sell or exchange and execute and deliver such notes or bonds as so determined and provided.

8. Conditions of sale or exchange. All such notes or bonds shall be sold at not less than par at public sale after notice setting forth the terms and conditions of sale, published in such newspapers circulating in the school district, and in such financial newspaper, as shall be designated by any such resolution, except in the following cases:

(a) If no bids are received at such public sale, or if all bids are rejected, any notes or bonds or part thereof may with the written assent of the commission be sold without further notice at private sale at any time within six months.

(b) With the approval in writing of the commission, any notes or bonds or part thereof may be exchanged for any notes or bonds, including interest thereon, of the school district issued under this or any other act. The rate of interest borne by any such notes or bonds may be higher or lower than the rate of interest borne by the notes or bonds surrendered.

(c) With the approval in writing of the commission, any notes or bonds may be issued directly to any creditor of the school district in absolute and unconditional payment of the indebtedness and interest thereon of such school district to such creditor, provided that notes or bonds shall not be so issued unless and until the amount

due such creditor has been determined by the board of education and by the commission, nor unless and until the school district receives from such creditor a release running to the school district and if such creditor is a party-plaintiff in any suit, action or proceeding pending against the school district relative to such indebtedness, a stipulation of dismissal of such suit, action or proceeding. Such release and such stipulation shall be approved as to form by counsel to the school district and by counsel to the commission.

(d) Any notes or bonds, or any part thereof, may be sold without any previous public offering to, and be purchased, by any sinking fund commission or the insurance or pension fund commissioners of the school district offering the bonds, or be sold to any board, commission or officers of the State, authorized by law to purchase such notes or bonds.

(e) Any notes or bonds payable not more than seven years from their date may be sold at private sale with the written assent of the commission.

9. Effect of resolutions. Excepting resolutions determining or altering the form of notes or bonds or providing for their sale, execution and delivery, and resolutions amendatory thereof or supplemental thereto, such resolutions adopted by the board of education shall be published in a newspaper circulating in the school district and shall take effect immediately upon such publication. Resolutions not required to be published shall take effect immediately upon adoption by the board of education. Thirty days after taking effect all resolutions shall be conclusively presumed to have been duly and regularly adopted by the board of education, and to comply with the provisions of this and of every other law; and the validity of any such resolution shall not

ereafter be questioned by either a party-plaintiff or a arty-defendant, except in a suit, action or proceeding ommenced prior to the expiration of such thirty days; nd unless a suit, action or proceeding questioning the alidity of notes or bonds purporting to be issued by irtue of any such resolution be commenced prior to the xpiration of such thirty-day period, any such notes or onds reciting that they are issued pursuant to this act all, after their issuance and delivery, if no suit relat- g thereto is then pending, be conclusively presumed to e fully authorized by all the laws of this State and to ave been issued, sold, executed and delivered by the hool district in conformity therewith and shall not be estioned by the school district or any taxpayer or gal voter thereof in any court, anything herein or in y other statutes to the contrary notwithstanding. As amended by P. L. 1936, Ch. 251.)

10. Power to raise taxes for payment of obligations sued hereunder. Any school district which shall have sued any notes or bonds pursuant to this act shall ve the power to raise by a district tax any sum or ms for the purpose of providing for the payment of e interest thereon and the principal thereof and for e setting aside of necessary reserve or sinking funds erefor. The full faith and credit of such school dis- ict shall be deemed to have been pledged for the punc- al payment of interest on and principal of all notes d bonds issued pursuant to this act.

11. Additional indebtedness and expenditures limited. order to conserve the financial resources of the school trict, neither the legal voters nor the board of educa- n thereof, without the assent in writing of the com- ission, shall issue or authorize the issuance of notes or nds of any kind or character, or create any obligation

or indebtedness of the school district, except pursuant to subdivision XIV of section eighty-six of the school act. Nor shall any action taken by the legal voters of the school district be effective in so far as it purports to raise by tax in any year any sum or sums for any purpose or purposes, except to provide for the payment of the interest on or principal of any debt or obligation of such school district or for the setting aside of necessary reserve or sinking funds therefor, in excess of the sum or sums voted to be raised by tax for like purposes in the preceding year without like assent of the commission.

12. Further limitations on expenditures. Whenever such school district, or the municipality with which such school district is coterminous, has been or shall be in default for twelve months in the payment of interest on any of its bonds or notes or other written evidence of indebtedness (except where the same is under litigation as to its validity, or where the validity thereof has been denied by formal notice given by the school district or municipality, and no suit, action or proceeding to enforce the same has been commenced by the holder); or whenever any such school district or municipality has been or shall be in default for six months in the payment of any part of its regular pay roll, or, in the case of the municipality, in the payment of any sums due from the annual tax levy to the State, county or school district, then in any event no action taken by the legal voters of the school district shall be effective in so far as it purports to raise by tax in any year any sum or sums for any purpose or purposes, except to provide for the payment of the interest on or principal of any debt or obligation of such school district or for the setting aside of necessary reserve or sinking funds therefor, in excess of such limits as may be fixed by the commission.

13. Assistants of commission; expenses. For the purpose of enabling the commission to carry out this act, the commission shall have power to employ an auditor and such other assistants, legal, clerical or otherwise, and to fix their duties, terms of service and compensation and to incur such other expenses as it may deem necessary, but no expenses (other than expenses directly attributable to the school district such as the costs of issuing the obligations of the school district and the costs of audit) shall be incurred exceeding ten thousand dollars ($10,000.00) for any one school district in any fiscal year of such school district without the consent of a justice of the Supreme Court.

14. Powers and duties of auditors. Whenever the commission shall certify to the board of education that it intends to exercise the powers conferred by this section, thereafter no claims shall be passed for payment by the board of education or other officers of the school district until the auditor of the commission shall have certified that the same have been examined by him and found to be within the amount voted to be raised by tax therefor, and that there is or will be available in an appropriate account sufficient ready funds for its payment. Furthermore, thereafter all warrants, checks or other instruments for the withdrawal or transfer of funds of the school district shall be submitted to such auditor for his counter-signature and no banking institution in which funds of the school district have heretofore been or shall thereafter be deposited shall honor warrants or checks drawn thereon unless the counter-signature of such auditor shall appear on the face of such instruments. The board of education shall provide an adequate office for such auditor, who shall have access to all books of account, records, papers and memoranda of such school district.

15. Expenses to be paid by school district. The commission shall from time to time certify to the board of education the amount of its expenses, which amount shall be a legal charge upon the school district payable to the commission, and may be raised by the issuance of notes by the board of education, but the amount so certified, if remaining unpaid, and the amounts of any notes so issued shall be included by the board of education, without any authorization by the legal voters of the school district, in the next succeeding amount certified to the county board of taxation as the amount to be raised by taxation for the purposes of the school district.

16. Power of commission to act directly. Whenever any direction of the commission authorized under this act has not been fully performed or carried out by the board of education or other officials of the school district affected, the commission shall have power to perform directly, or cause to be performed by its agents, in the name of the school district, any act so directed by the commission under the provisions of this act, including the power to execute, sell, issue and deliver any notes or bonds directed by the commission to be issued by the school district for the funding or refunding of its indebtedness in the manner and mode of procedure provided by the commission act for the issuance of notes or bonds by a municipality.

17. Remedies. Whenever the commission shall function in a municipality having a school district coterminous therewith which is governed by the provisions of Article VII of the school law,

(a) no judgment, decree, levy or execution against such school district or the property thereof for the recovery of the amount due on any bonds, notes or other

obligations of the school district, in the payment of which such school district has defaulted shall be enforced until otherwise specially ordered by the Supreme Court or a justice thereof in an appropriate proceeding for such purpose, after notice to the commission, and the enforcement of any such judgment, decree, levy or execution shall be and it hereby is stayed until otherwise specially ordered as aforesaid;

(b) no action or proceeding of any kind either direct or ancillary, by way of mandamus or otherwise, shall be brought against such school district, municipality, or any public officers for the assessment, levy or collection of taxes for such school district and any and all actions or proceedings therefor shall be and they hereby are stayed except that first, the Supreme Court or a justice thereof, after notice to the commission may authorize one or more creditors of such school district to bring and maintain an action or proceeding therefor in the Supreme Court, which shall be brought for the benefit of themselves and all other creditors of such school district and in which all other creditors of such school district shall have the right to intervene and assert their claim and in which all other creditors of such school district may, and said commission shall, be made parties in such manner and upon such notice as the Supreme Court shall approve; and except that, second, the commission may bring and maintain an action or actions by way of mandamus or by any other appropriate proceedings or proceedings for the assessment, levy or collection of taxes for such school district for the payment of principal and/or interest of the indebtedness of the school district found to be outstanding as provided in section one of this act; without limiting its power otherwise to direct by mandamus the assessment, levy or collection of taxes, the Supreme Court in any such proceedings may, to the extent which it shall deem just and

equitable, afford to the holders collectively of any due and unpaid claims against a school district any remedy which might be afforded under any other law to any individual creditor in any mandamus proceeding for the assessment, levy or collection of taxes, to the same extent as if there had been an entry of judgment in their favor, issuance of execution and return thereof unsatisfied, service thereof upon public officials and performance of any and all other conditions precedent to the affording of such relief by mandamus under such other law; *provided, however,* that the court be first satisfied from proof submitted by affidavit or otherwise that the claims for the enforcement of which such remedy is sought are claims upon which a judgment could be obtained; (As amended by P. L. 1936, Ch. 251.)

(c) no action or proceeding at law or in equity shall be brought or prosecuted, the purpose of which is to affect the disposition of property or funds owned or controlled by the school district, except as herein provided; if any such school district has in its possession or under its control, or there is in the possession or under the control of the commission, any property or funds of such school district which are or may be available for the payment of interest or principal upon any of the debts of such school district (over and above the payment of the current operating expenses of the school district and the maintenance of a reasonable working capital), then such school district in its discretion may apply, or if directed by the commission shall apply, to the Supreme Court to determine the application and distribution of such property or funds to and among the creditors of the school district, and in any such case the Supreme Court in its discretion may permit an application for relief of the same character to be made by any creditor of the school district; in any such proceedings all creditors of the school district shall be made

parties thereto in such manner and upon such notice by publication or otherwise as the Supreme Court shall approve, and any creditor may appear therein and assert his rights to receive all or any part of such property or funds; in case any such proceeding shall be instituted, the Supreme Court may direct the municipality to make no payments from any of such moneys so available until the determination of the proceeding or until permitted by the Supreme Court; unless and until such a direction shall be made, payments may be made by such municipality on account of principal and interest as the municipality may determine and as may be approved by the Municipal Finance Commission;

(d) upon the application of any creditor, made upon notice to the school district and the commission, the Supreme Court may vacate, modify or restrict any statutory stay contained in this article. (As amended by P. L. 1936, Ch. 251.)

18. Plan of adjustment of debts. (1) Whenever the commission shall function in any municipality having a school district coterminous therewith which is governed by the provisions of Article VII of the school law, then, upon the verified petition of any creditors of such school district made on behalf of themselves and all other creditors of the school district for the approval of a plan of adjustment or composition of the claims of all creditors or of a class or classes of them similarly situated, which plan shall be submitted with and made a part of the petition, the Supreme Court by a justice thereof may take jurisdiction of the subject matter and order the filing of the petition in the office of the clerk of the Supreme Court. The school district and the commission shall be made parties to such proceeding. All creditors of the school district shall be made parties

thereto by notice to be published and given in such manner as the Supreme Court by its justice may direct. Any creditor of the school district may appear and assert his rights. In the petition the creditors shall allege that the school district is or will be unable to pay in full according to their terms the claims proposed to be adjusted or composed and perform its public functions and preserve the value of property subject to taxation; that the adjustment or composition proposed in the plan is substantially measured by the capacity of the school district to pay, is in the interests of all the creditors affected thereby, and is not detrimental to other creditors of the school district or of the municipality.

(2) In any such proceeding, after hearing on the plan proposed or on the plan as modified by order and if such plan as proposed or modified is approved in writing by creditors representing eighty-five per centum (85%) in amount of the indebtedness affected thereby and by the school district and the commission, the Supreme Court by a justice thereof may by order authorize and approve such adjustment or composition if the court by its justice determines (1) that the school district is unable to pay in full according to their terms the claims proposed to be adjusted or composed, and perform its public functions and preserve the value of property subject to taxation, (2) that the adjustment or composition is substantially measured by the capacity of the school district to pay, (3) that it is in the interest of all the creditors affected thereby, and (4) that it is not detrimental to other creditors of the school district or of the municipality.

(3) The plan of adjustment or composition so authorized and approved shall forthwith and without any further action of any kind be binding upon all the creditors

included in such plan, whether or not they appear in such proceeding, and insofar as said plan provides for the substitution of any new bonds, notes, or other obligations of the school district in place of any outstanding bonds, notes or other obligations or claims then outstanding, such substitution shall be effectual from and after such date as may be fixed in such order.

(4) After the institution of any proceeding provided for by this section and pending the determination thereof, the Supreme Court by a justice thereof may by order continue the stay provided by the act of which this act is a supplement. In the event that a plan shall be authorized and approved pursuant to this act, the court shall retain jurisdiction of such proceeding and thereafter no creditor whose claim is included in such adjustment or composition shall be authorized to bring any action or proceeding of any kind or character for the enforcement of his claim except with the permission of the Supreme Court and then only to recover and enforce the rights given to him by such adjustment or composition.

(5) Notwithstanding any provisions of this act, the commission shall not approve any adjustment or composition or plan presented pursuant to this section, which provides for the reduction in the principal amount of any outstanding notes or bonds of the school district.

19. Act severable. The powers granted and the duties imposed by this act shall be independent and severable. If any one or more sections, clauses, sentences or parts of this act shall for any reason be questioned in any court, and shall be adjudged unconstitutional or invalid, such judgment shall not affect, impair or invalidate the remaining provisions thereof, but shall be confined in its operation to the specific provision so held unconstitutional or invalid.

20. Act remedial. It is declared and enacted that this act is intended by the Legislature to meet the public emergency arising from a default in the payment of municipal and school district obligations, and the resulting impairment of public credit requiring intervention by the State to provide for the payment of existing obligations in such a way as to cause the least embarrassment to property owners as taxpayers; that this act is remedial in nature, and that the powers hereby granted shall be liberally construed.

21. Act effective. This act shall take effect immediately, and, as to the subject matters thereof, shall supersede the provisions of all other laws.

Approved June 8, 1935.